A

DATO' DR ZAMBRY ABD KADIR

v.

DATO' SERI IR HJ MOHAMMAD NIZAR JAMALUDDIN; ATTORNEY GENERAL OF MALAYSIA (INTERVENER)

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
C [CIVIL APPEAL NO: W-01-112-2009]
26 JUNE 2009

CONSTITUTIONAL LAW: *Executive - Appointment of Menteri Besar - Right of Sultan to appoint as Menteri Besar individual who*
D *commands support of majority of members of Legislative Assembly - Perak State Constitution, arts. XVI(2),(6), XVIII(2)(a), XXXVI(2), (4)*

CONSTITUTIONAL LAW: *Executive - Dismissal of Menteri Besar*
E *- Whether office of Menteri Besar held at pleasure of Sultan - Request for dissolution of State Assembly made under Perak State Constitution, art. XVI(6) rejected by Sultan - Menteri Besar asked to resign by Sultan - Whether dismissal of Menteri Besar valid - Whether essential for motion of no confidence to first be passed in Legislative Assembly to dismiss*
F *Menteri Besar - Menteri Besar ceased to command confidence of majority of members of Legislative Assembly - Whether Menteri Besar's refusal to tender his resignation and resignation of Executive Council unconstitutional - Perak State Constitution arts. X, XVI(2),(6, XVIII(2)(a), XXXVI(2),(4), LXVII*

G ***CONSTITUTIONAL LAW:*** *Preservation of rights and powers of Sultan - Prerogative powers - Discretion of Sultan to agree or refuse to dissolution of State Assembly - Power to appoint Menteri Besar - Powers exercisable by Sultan in his absolute discretion - Decision of Sultan non-justiciable*

H

CONSTITUTIONAL LAW: *Legislature - State Assembly - Dissolution of - Whether Sultan has absolute discretion to withhold consent for request for dissolution of Legislative Assembly - Request for dissolution made under Perak State Constitution, art. XVI(6) - Whether withholding of*
I *consent for dissolution is a Royal Prerogative and is not justiciable - Perak State Constitution arts. XVI(6), XVIII(2)(a)*

At the conclusion of the 12th General Election, Pakatan Rakyat (comprising of PKR, PAS and DAP) won 31 seats in the Perak State Legislative Assembly ('Legislative Assembly') whilst Barisan Nasional won 28 seats. Thereafter, Pakatan Rakyat, led by the respondent ('Nizar'), formed the State Government whereof Nizar was appointed as Menteri Besar on 17 March 2008. However, in early 2009, it was announced by the Speaker of the Legislative Assembly ('Speaker') that by separate letters addressed to him, the Behrang Assemblyman and Changkat Jering Assemblyman, both of whom from PKR, as well as the Jelapang Assemblywoman from DAP ('the trio'), had resigned as members of the Legislative Assembly. The Speaker further announced that he had accepted the resignations and consequently declared their seats as vacant. The trio however claimed that they did not issue any such resignation letters, whilst the Election Commission too refused to establish that there was a 'casual vacancy' for the 3 state seats. Be that as it may, the DYMM Sultan of Perak ('Sultan') thereafter received letters from the trio stating that they had lost confidence in Nizar as the Menteri Besar and that they were leaving their respective political parties but maintaining their positions as members of the Legislative Assembly. And they also declared their support to Barisan Nasional. In the light of these events, Nizar had an audience with the Sultan whereat he made a request to dissolve the Legislative Assembly. In the meanwhile, the Barisan Nasional claimed that it then had the command of the confidence of 31 members of the Legislative Assembly, and arising therefrom, the Sultan met and interviewed the said 31 members. As it transpired, at the said meeting with the Sultan, all 31 members had declared their support to Barisan Nasional, and the Sultan, hence, rejected Nizar's request for the dissolution of the Legislative Assembly and further asked Nizar and his Executive Council to resign since they no longer commanded the confidence of the majority of the members of the Legislative Assembly. The Sultan also, in accordance with Article XVI(2) of the Perak Constitution, appointed the appellant ('Zambry') as the Menteri Besar. Dissatisfied, Nizar filed an application for a judicial review. The learned judge below was of the view that: (i) the request for the dissolution of the Legislative Assembly by Nizar was made pursuant to art. XXXVI(2) and not art. XVI(6) of the State Constitution; (ii) if Nizar had lost the confidence of the majority of the members of the Legislative Assembly, only the Legislative Assembly could determine the issue by a vote of no confidence in the Legislative Assembly; (iii) the Sultan was not entitled to

A B C D E F G H I

A interview the members of the Legislative Assembly to ascertain who commanded the majority in the Legislative Assembly; and (iv) Nizar did not hold the office of Menteri Besar at the pleasure of Sultan and hence he could not be dismissed the way he had been. The learned Judge in the circumstances allowed Nizar's application
B and held that Nizar was the rightful Menteri Besar. This was Zamby's appeal against the decision.

Held (allowing the appeal)
Per Raus Sharif JCA:

C
(1) Under the Perak State Constitution, the request for dissolution of the Legislative Assembly is found in art. XXXVI(2) and art. XVI(6). The Sultan has the absolute discretion to withhold the consent for a request for the dissolution of the
D Legislative Assembly, irrespective of whether the request is made under art. XXXVI(2) or art. XVI(6). The withholding of consent to a request for the dissolution is a Royal Prerogative and is not justiciable. (paras 10, 11 & 12)

(2) It was clear from the uncontroverted documentary evidence
E that the request for the dissolution of the Legislative Assembly was made under art. XVI(6) of the Perak State Constitution. The learned judge's finding that the request by Nizar for the dissolution of the Legislative Assembly was under art. XXXVI(2) could not be supported. (paras 26 & 30)

F
(3) Under art. XVI(6) there is no mandatory and/or express requirement that there must be a motion of no confidence passed in the Legislative Assembly against a Menteri Besar before he ceases to command the confidence of the majority
G of the members. The fact that a Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly can be established by other means. The learned judge had erred in law in concluding that the only manner in which the loss of confidence could only be
H ascertained was by way of motion to be passed in the Legislative Assembly. (paras 32 & 47)

(4) The appointment of Menteri Besar is provided for under art. XVIII(2)(a) of the Perak State Constitution. The Sultan
I has the right to appoint an individual who in the Sultan's judgment, has the command or support of the majority of the members of the Legislative Assembly. The Barisan Nasional led

by Zambry had the command or support of the majority of the members of the Legislative Assembly. Hence, his appointment as the Menteri Besar by the Sultan was in accordance with the Perak State Constitution. (paras 48 & 49)

Per Zainun Ali JCA (concurring):

(1) A request for dissolution of the Legislative Assembly under art. XXXVI(2) if granted by His Royal Highness, would result in a fresh election pursuant to art. XXXVI(4). The position is diametrically different if the request for dissolution of the Legislative Assembly is made under art. XVI(6) and the consent of the Sultan is withheld. The Menteri Besar shall then have no option but to tender the resignation of the Executive Council. One of the factors influencing the Sultan's discretion to withhold consent is when the Chief Minister has lost the confidence of the majority in the Legislative Assembly and not otherwise. (paras 143, 144 & 147)

(2) The decision whether to grant or withhold his consent upon such request being made is an act of the Sultan's discretion. It is completely within the Sultan's discretion and within the contemplation of the relevant articles in the Perak State Constitution for the Sultan to make enquiries. The Sultan's enquiry was nothing more than His Royal Highness' exercise of his prerogative power. The decision thereof is non-justiciable. (paras 216, 218, 221 & 240)

Per Ahmad Maarop JCA (concurring):

(1) There is no mandatory and/or express requirement in the Perak State Constitution that provides that there must be a vote of no confidence passed in the Legislative Assembly against Nizar before he ceased to command the confidence of the majority of the members of the Legislative Assembly. The fact that Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly under art. XVI(6) could be established by other means. Thus, His Royal Highness was right in making enquiries to satisfy himself as to whether Nizar had in fact ceased to command the confidence of the majority of the members of the Legislative Assembly, in considering Nizar's request for the dissolution of the Legislative Assembly. (para. 392)

(2) Article XVI(6) is intended to apply to a situation when the Menteri Besar ceases to command the confidence of the majority of the members of Legislative Assembly, in which case, unless, at his request the Sultan dissolves the Legislative Assembly, he ought not to remain in office, so that the Executive Council can be dissolved, and a new Executive Council can be appointed by the Sultan under art. XVI(2) to advise him. (para 405)

(3) Nizar's refusal to tender his resignation and the resignation of the Executive Council was not merely a breach of convention and undemocratic, but more importantly, it contravened the clear mandatory constitutional command under art. XVI(6) and therefore unconstitutional. Thus, since he had ceased to command the confidence of the majority of the members of the Legislative Assembly, it is implicit that on his refusal to tender the resignation as aforesaid, the Executive Council was thereby dissolved and the office of the Menteri Besar vacated. (para 406)

(4) Under art. XVI(2)(a), the power to appoint the Menteri Besar is conferred upon the Sultan. Under art. XVIII(2)(a), this power is exercisable by the Sultan in his absolute discretion. It is His Royal Highness' prerogative. In other words, in making the appointment of the Menteri Besar, the Sultan is not subject to recommendation or the approval or consent of any other person. The only qualification under art. XVI(2)(a) is that the Sultan shall appoint as Menteri Besar a member of the Legislative Assembly, who, in his judgment is likely to command the confidence of the majority of the members of the Legislative Assembly. (para 408)

(5) The power of His Royal Highness to dismiss the Menteri Besar is implicit in the event that the Menteri Besar refuses to resign although he has ceased to command the confidence of the majority of the members of the Legislative Assembly and His Roral Highness has, on his request, withheld His Royal Highness' consent to dissolve the Legislative Assembly. So, even if the press statement issued by His Royal Highness through his private secretary on 5 February 2009 amounted to the dismissal of Nizar, the dismissal was still valid. His Royal Highness was right in appointing Zambry as the Menteri Besar of Perak under art. XVI(2)(a). (para 416)

Bahasa Malaysia *Translation Of Headnotes*

Di akhir Pilihanraya Umum ke 12, Pakatan Rakyat (terdiri dari PKR, PAS dan DAP) telah memenangi 31 kerusi Dewan Undangan Negeri Perak ('Dewan Undangan') sementara Barisan Nasional memenangi 28 kerusi. Berikutnya, Pakatan Rakyat, dengan diketuai oleh responden ('Nizar'), telah menubuhkan Kerajaan Negeri di mana Nizar dilantik sebagai Menteri Besar pada 17 Mac 2008. Walaupun begitu, pada awal tahun 2009, ianya diumumkan oleh Speaker Dewan Undangan ('Speaker') bahawa, melalui surat-surat yang dihantar secara berasingan kepadanya, wakil-wakil Behrang dan Changkat Jering, kedua-duanya dari PKR, serta wakil DAP dari Jelapang ('ketiga-tiga wakil tersebut'), telah meletak jawatan sebagai ahli Dewan Undangan. Diumumkan seterusnya bahawa beliau, yakni Speaker, telah pun menerima perletakan jawatan ketiga-tiga wakil tersebut dan telah dengan itu mengisytiharkan kerusi-kerusi yang berkaitan sebagai kosong. Ketiga-tiga wakil tersebut bagaimanapun mengatakan bahawa mereka tidak pernah mengeluarkan surat-surat perletakan jawatan seperti yang didakwa, sementara Suruhanjaya Pilihanraya juga enggan mengisytiharkan bahawa wujud kekosongan bagi ketiga-ketiga kerusi. Apapun, berikutnya DYMM Sultan Perak ('Sultan') telah menerima surat dari ketiga-tiga wakil tersebut menyatakan bahawa mereka telah hilang kepercayaan terhadap Nizar sebagai Menteri Besar, dan bahawa mereka telah meninggalkan parti-parti politik mereka masing-masing walaupun masih tetap menjadi ahli Dewan Undangan. Ketiga-tiga mereka juga mengisytiharkan sokongan terhadap Barisan Nasional. Dalam kekecohan yang berlaku, Nizar telah mengadap Sultan di mana beliau telah memohon untuk membubarkan Dewan Undangan. Sementara itu, Barisan Nasional mendakwa bahawa ia sudah pun mempunyai sokongan 31 ahli Dewan Undangan, dan berbangkit dari dakwaan tersebut, Sultan telah menemui dan menemuduga kesemua 31 ahli Dewan Undangan berkenaan. Sepertimana halnya, di perjumpaan dengan Sultan tersebut, kesemua 31 ahli telah mengisytiharkan sokongan mereka kepada Barisan Nasional, dan Sultan, dengan itu, telah menolak permohonan Nizar untuk membubarkan Dewan Undangan dan seterusnya meminta Nizar serta ahli Majlis Mesyuarat Kerajaannya supaya meletakkan jawatan disebabkan tidak lagi mendapat kepercayaan dan sokongan majoriti ahli Dewan Undangan. Sultan juga, selaras dengan peruntukan art. XVI(2) Perlembagaan Perak, telah melantik perayu ('Zambry') sebagai

A Menteri Besar yang sah. Tidak berpuas hati, Nizar memfailkan permohonan semakan kehakiman. Yang arif hakim berpendapat bahawa: (i) permohonan untuk membubarkan Dewan Undangan oleh Nizar adalah dibuat di bawah peruntukan art. XXXVI(2) dan bukannya art. XVI(2) Perlembagaan Perak; (ii) jika Nizar telah B hilang sokongan majoriti ahli Dewan Undangan, maka hanya Dewan Undangan yang boleh menentukan isu tersebut melalui pengambilan undi tidak percaya di dalam Dewan Undangan; (iii) Sultan tiada kuasa untuk menemuduga ahli Dewan Undangan bagi mempastikan siapa yang mempunyai sokongan majoriti ahli Dewan C Undangan; dan (iv) Nizar tidak memegang jawatan Menteri Besar atas ehsan Sultan dan oleh itu tidak boleh digugurkan dari jawatan itu oleh Sultan. Yang arif hakim, dengan yang demikian, telah membenarkan permohonan Nizar sekaligus mengisytiharkan Nizar sebagai Menteri Besar yang sah. Ini adalah rayuan Zambry D terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan)
Oleh Raus Sharif HMR:

E **(1)** Di bawah Perlembagaan Negeri Perak, permohonan untuk membubarkan Dewan Undangan diperuntukkan di bawah art. XXXVI(2) dan XVI(6). Sultan mempunyai budibicara mutlak untuk menahan persetujuan terhadap permohonan membubarkan Dewan Undangan, tidak kiralah sama ada F permohonan dibuat di bawah art. XXXVI(2) atau art. XVI(6). Penahanan persetujuan terhadap sesuatu permohonan pembubaran adalah Hak Istimewa Raja dan adalah tidak boleh diadili.

(2) Dari keterangan dokumentari yang tidak disangkal, jelas bahawa G permohonan untuk pembubaran Dewan Undangan dibuat di bawah art. XVI(6) Perlembagaan Negeri Perak. Dapatan yang arif hakim bahawa permohonan Nizar untuk membubarkan Dewan Undangan adalah dibuat dibawah art. XXXVI(2) tidak dapat disokong.

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(3) Tidak terdapat kehendak mandatori dan/atau ekspres di bawah art. XVI(6) yang mengkehendaki suatu usul tidak percaya diluluskan di dalam Dewan Undangan terhadap Menteri Besar sebelum beliau boleh hilang kepercayaan majoriti ahli-ahlinya. I Fakta tentang seseorang Menteri Besar hilang kepercayaan majoriti ahli Dewan Undangan boleh sahaja dibuktikan dengan

cara-cara lain. Maka yang arif hakim khilaf di sisi undang-undang dalam merumuskan bahawa satu-satunya cara di mana kehilangan kepercayaan boleh ditentukan adalah melalui usul yang akan diluluskan di dalam Dewan Undangan.

(4) Soal perlantikan seorang Menteri Besar diperuntukkan di bawah art. XVIII(2) Perlembagaan Negeri Perak. Sultan mempunyai hak untuk melantik mana-mana individu yang pada pandangan Sultan mempunyai kepercayaan atau sokongan majoriti ahli Dewan Undangan. Barisan Nasional yang diketui oleh Zambry mempunyai kepercayaan dan sokongan majoriti ahli Dewan Undangan. Oleh itu, perlantikannya sebagai Menteri Besar oleh Sultan adalah selaras dengan Perlembagaan Negeri Perak.

Oleh Zainun Ali HMR (menyokong):

(1) Satu permohonan untuk pembubaran Dewan Undangan di bawah art. XXXVI(2), jika diizinkan oleh Ke bawah Duli Tuanku, akan mencetuskan pilihanraya baru di bawah art. XXXVI(4). Kedudukannya adalah amat berbeza jika permohonan pembubaran dibuat di bawah art. XVI(6) dan izin tidak diberi oleh Sultan. Menteri Besar pada waktu itu tiada pilihan melainkan untuk meletakkan jawatan Majlis Mesyuarat Kerajaannya. Salah satu faktor yang mempengaruhi budibicara Sultan untuk tidak memberikan izin adalah bilamana Menteri Besar sudah hilang kepercayaan majoriti ahli di dalam Dewan Undangan dan bukan sebaliknya.

(2) Keputusan sama ada untuk memberi atau menahan izin terhadap sesuatu permohonan pembubaran adalah satu tindakan budibicara Sultan. Ia berada sepenuhnya dalam budibicara Sultan dan bagi Sultan untuk membuat penyiasatan adalah selaras dengan apa yang diperuntukkan oleh artikel-artikel berkaitan di dalam Perlembagaan Negeri Perak. Penyiasatan oleh Sultan adalah tidak lebih dari pelaksanaan kuasa-kuasa prerogatif Ke bawah Duli Tuanku. Keputusan tersebut dengan itu adalah tidak boleh diadili.

Oleh Ahmad Maarop HMR (menyokong):

(1) Tiada syarat ekspres dan/atau mandatori di dalam Perlembagaan Negeri Perak yang memperuntukkan bahawa harus terdapat undi tidak percaya diluluskan di dalam Dewan Undangan terhadap Nizar sebelum beliau boleh dikatakan

A hilang kepercayaan majoriti ahli Dewan Undangan. Fakta bahawa Nizar telah hilang kepercayaan majoriti ahli Dewan Undangan di bawah art. XVI(6) boleh juga ditentukan melalui cara-cara lain. Oleh itu, Ke bawah Duli Tuanku adalah betul dalam menjalankan penyiasatan bagi memuaskan hatinya
B mengenai sama ada Nizar telah sebenarnya hilang kepercayaan majoriti ahli Dewan Undangan, ketika menimbang permohonan Nizar untuk membubarkan Dewan Undangan.

(2) Artikel XVI(6) adalah dihasratkan untuk terpakai kepada situasi di mana Menteri Besar telah hilang kepercayaan majoriti ahli
C Dewan Undangan, dalam kes mana, kecuali, jika atas permohonannya, Sultan membubarkan Dewan Undangan, beliau tidak lagi boleh terus memegang jawatannya, dan begitu juga dengan Majlis Mesyuarat Kerajaan yang perlu diganti dengan Majlis Mesyuarat Kerajaan yang baru yang akan
D dilantik Sultan di bawah art. XVI(2) bagi menasihatinya.

(3) Keengganan Nizar untuk meletakkan jawatannya dan jawatan Majlis Mesyuarat Kerajaan bukan sahaja tidak demokratik dan melanggar konvensyen, malah, lebih penting lagi, telah
E melanggar arahan mandatori perlembagaan yang jelas di bawah art. XVI(6), dan kerana itu adalah tidak berperlembagaan. Oleh yang demikian, oleh kerana beliau telah tidak lagi mendapat kepercayaan majoriti ahli Dewan Undangan, adalah implicit bahawa atas keengganan beliau untuk meletakkan jawatan
F seperti di atas, maka Majlis Mesyuarat Kerajaan telah dengan sendirinya terbubar dan jawatan Menteri Besar juga menjadi kosong.

(4) Di bawah art. XVI(2)(a), kuasa untuk melantik Menteri Besar
G diberikan kepada Sultan. Di bawah art. XVIII(2)(a), kuasa ini boleh dilaksanakan oleh Sultan menurut budibicara mutlaknya. Ia adalah prerogatif Ke bawah Duli Tuanku. Ertinya, dalam melantik Menteri Besar, Sultan tidak tertakluk kepada syor atau kelulusan atau keizinan dari mana-mana orang. Satu-
H satunya syarat di bawah art. XVI(2)(a) adalah bahawa Sultan hendaklah melantik sebagai Menteri Besar seorang ahli Dewan Undangan yang pada pandangannya berkemungkinan mendapat kepercayaan majoriti ahli Dewan Undangan.

I

(5) Kuasa Ke bawah Duli Tuanku untuk membuang Menteri Besar adalah implicit jika Menteri Besar enggan meletak jawatan walaupun sudah kehilangan kepercayaan majoriti ahli Dewan Undangan dan Ke bawah Duli Tuanku pula, atas permintaan Menteri Besar, telah tidak memberi izin kepada permohonan untuk membubarkan Dewan Undangan. Oleh itu, jikapun kenyataan akhbar yang dikeluarkan Ke bawah Duli Tuanku melalui setiausaha peribadi beliau pada 5 September 2009 tersebut merupakan pembuangan Nizar, pembuangan tersebut adalah masih sah. Oleh yang demikian, Ke bawah Duli Tuanku betul dalam melantik Zambry sebagai Menteri Besar Perak di bawah art. XVI(2)(a).

Case(s) referred to:

Adegbenro v. Akintola [1963] 2 WLR 63 ***(refd)***

Burmah Oil Co Ltd v. Lord Advocate [1965] AC 75 ***(refd)***

Council of Civil Service Union & Ors v. Minister for the Civil Service [1984] 3 All ER 935 ***(foll)***

Datuk (Datu) Amir Kahar Tun Dato' Haji Mustapha v. Tun Mohd Said Keruak & Ors [1995] 1 CLJ 184 HC ***(foll)***

Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarious George Fernandez & Anor [1988] 1 LNS 161 ***(refd)***

Fothergill v. Monarch Airlines Ltd [1981] AC 251 ***(refd)***

Government of Malaysia v. Mahan Singh [1975] 2 MLJ 155 ***(refd)***

Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257 ***(refd)***

Juraimi Husin v. Pardons Board of State of Pahang & Ors [2002] 4 CLJ 529 FC ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon – Kumagi Sdn Bhd [1994] 2 MLJ 789 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 ***(refd)***

Noordin Salleh v. State Legislative Assembly in Kelantan [1993] 3 MLJ 344 ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

Re Amendment of the Constitution of Canada [1982] 125 DLR (3d) 1 ***(refd)***

Stephen Kalong Ningkan v. Government of Malaysia [1968] 2 MLJ 238 ***(refd)***

Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187 ***(not foll)***

Sukma Darmawan Sasmitat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Tan Sooi Shin v. Kow Kek Hing (1) [1991] 3 CLJ 1895; [1991] 4 CLJ (Rep) 107 HC ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

A *Tindok Besar Estate Sdn Bhd v. Jujur Co [1979] 2 MLJ 229* ***(refd)***
Tun Datu Hj Mustapha Datu Harun v. Tun Datu Haji Mohamed Adnan Robert [1986] 2 MLJ 420 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 8
B Federal Constitution, arts. 39, 40, 43(4), 71, 160(2), 181
Interpretation Acts 1948 and 1967, ss. 47, 98
Malacca State Constitution, art. 19(5)
Negeri Sembilan State Constitution, art. 56(5)
Perak State Constitution, arts. IV(3), X, XII, XVI(1), (2), (5), (6), (7),
C XVIII(2)(a), (b), XXXVI(2), (5)
Perlis State Constitution, art. 55(5)
Rules of the High Court 1980, O. 53
Sabah State Constitution, arts. 6(3), 7(1)
Sarawak Constitution, arts. 6(3), 7(1)
Terengganu State Constitution, art. 44(5)
D
Constitution of Cook Islands, arts. 13(2)(a), 14(2)
Constitution of West Nigeria, s. 33(10)

Other source(s) referred to:

Brian Thompson, *Constitutional & Administrative Law,* 3rd edn, p 114
E *Halsbury's Laws of Malaysia,* vol 2 pp 25, 46
Hilaire Barnett, *Constitutional and Administrative Law,* 2nd edn, p 388
SA de Smith, *Constitutional and Administrative Law,* p 105
Wade and Philips, *Constitutional and Administrative Law,* p 43

F *For the appellant - Dato' Cecil Abraham (Rishwant Singh & Farah Shuhadah Razali with him); M/s Zul Rafique & Partners*
For the respondent - Tuan Hj Sulaiman Abdullah (Philip Koh, Chan Kok Keong, Ranjit Singh, Razlan Hadri, Edmund Bon, Amer Hamzah, Leong Cheok Keng, Hanipa Maidin & Zulqarnain Lukman with him); M/s Leong & Tan
G *For the intervener - Tan Sri Abdul Ghani Patail (Tun Abdul Majid Tun Hamzah, Puan Azizah Nawawi, Amarjeet Singh Sarjit Singh, Suzana Atan & Andi Razalijaye A Dadi with him) A-G's Chambers*
For the Watching Brief for Barisan Nasional - Dato' Hafarizam Harun (Firuz Hussein Jamaluddin & M Reza Hassan with him)
H *For the Watching Brief for Pakatan Rakyat - Cheng Poh Heng*

[Appeal from High Court, Kuala Lumpur; Application for Judicial Review No: R6(R3)-25-25-2009]

Reported by Amutha Suppayah

I

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal by the appellant ("Zambry") against the decision of the High Court at Kuala Lumpur delivered on 11 May 2009 allowing the respondent's ("Nizar") application for Judicial Review pursuant to O. 53 of the Rules of the High Court 1980.

Facts

[2] The brief facts of this case are these. At the conclusion of the 12th General Election held on 8 March 2008, the political alliance of Pakatan Rakyat comprising members of Parti KeAdilan Rakyat ("PKR"), Parti Islam Semalaysia ("PAS") and the Democratic Action Party ("DAP") won 31 seats for the Perak State Legislative Assembly ("Legislative Assembly"). The other 28 seats were won by the Barisan Nasional. The composition of the seats in the Legislative Assembly as on 8 March 2008 were as follows.

PAKATAN RAKYAT		**BARISAN NASIONAL**	
Party	**No. of Seats**	**Party**	**No. of Seats**
PKR	7	UMNO	27
PAS	6	MCA	1
DAP	18	MIC	0
Total	31	Total	28

[3] Based on the majority of seats won by Pakatan Rakyat in the Legislative Assembly, Pakatan Rakyat led by Nizar sought the consent of the DYMM Sultan of Perak to form the State Government. The DYMM Sultan of Perak gave His Royal Highness' consent. In accordance with the Laws of the Constitution of Perak ("Perak State Constitution") and pursuant to art. XII and XVI of Perak State Constitution, Nizar was appointed and took his oath of office as Menteri Besar on 17 March 2008.

[4] Nizar's tenure as Menteri Besar did not last for long. On 6 February 2009, the DYMM Sultan of Perak appointed Zambry as the Menteri Besar. The events that led to the appointment of Zambry as Menteri Besar replacing Nizar, may be summarised as follows:

A 4.1 On 30 January 2009, it was announced by separate letters addressed to the Speaker of the Legislative Assembly ("Speaker"), that Behrang Assemblyman and Changkat Jering Assemblyman from PKR have resigned as members of the Legislative Assembly.

B 4.2 On 1 February 2009, the Speaker announced that he had accepted the resignation of the two Assemblymen. He declared that the seats for Behrang (N59) and Changkat Jering (N14) vacant. The Speaker, accordingly informed C the Election Commission of the vacancies.

4.3 However, on the same day, the Behrang and Changkat Jering Assemblymen, separately sent a letter to the DYMM Sultan of Perak, stating:

D 4.3.1 They did not issue any letter of resignation as alleged by the Speaker; and

4.3.2 They were still serving and carrying out their duties as the Assemblymen for the Behrang and E Changkat Jering constituents respectively.

4.4 On the very same day, the Behrang and Changkat Jering Assemblymen, separately issued a letter to the Speaker, stating:

F 4.4.1 Any letter and/or notice purporting to contain their resignation as members of the Legislative Assembly whether dated before, on or after 1 February 2009 was invalid *ab initio* due to non-occurance of an event;

G 4.4.2 At all material time, they had not tendered their resignation letter to the Speaker as alleged; and

4.4.3 The purported letter of resignation was not dated by them and the act of any person inserting the H date on the purported letter of resignation was done without their prior approval and/or consent.

4.5 The abovementioned letters dated 1 February 2009 were copied to the State Secretary, the State Legal Advisor, the I Secretary of the Legislative Assembly and the Director of Election for the State of Perak.

4.6 On 2 February 2009, the Behrang and Changkat Jering Assemblymen separately lodged a police report at the Bentong and Shah Alam Police Stations respectively stating:

4.6.1 They did not tender the purported resignation letter to the Speaker;

4.6.2 At all material time, they were on medical leave; and

4.6.3 The purported resignation letter was invalid, fraudulent and issued in bad faith.

4.7 On the same day, at about 5.30pm, Nizar had an audience with the DYMM Sultan of Perak at which he informed His Royal Highness on the resignation of the Assemblymen from Behrang and Changkat Jering.

4.8 On 3 February 2009, both the Behrang and Changkat Jering Assemblymen separately wrote to the DYMM Sultan of Perak to inform His Royal Highness that they:

4.8.1 Have lost their confidence in Nizar as the Menteri Besar;

4.8.2 Will not support Nizar as the Menteri Besar; and

4.8.3 The Barisan Nasional now has a majority in the Legislative Assembly.

4.9 On the same day ie, 3 February 2009, it was announced by the Speaker that he had received a letter of resignation from the Jelapang Assemblywoman as a member of the Legislative Assembly. The Speaker also announced that he had accepted her resignation and accordingly declared the seat for Jelapang (N31) as vacant. The Speaker informed the Election Commission of the vacancy.

4.10 However, on the same day, the Jelapang Assemblywoman, who is from DAP, issued a letter to the Speaker stating:

4.10.1 Any letter or notice of resignation purporting to contain her resignation as a member of the Legislative Assembly and which do not bear her official stamp is *void ab initio*;

A

4.10.2 She has lost her confidence in DAP;

4.10.3 She is leaving DAP; and

4.10.4 Her declaration on leaving DAP does not operate as her resignation of a member of the Legislative Assembly.

B

4.11 On the same day, the Jelapang Assemblywoman wrote to the DYMM Sultan of Perak to inform His Royal Highness that she:

C

4.11.1 Has lost her confidence in Nizar as the Menteri Besar;

4.11.2 Will not support Nizar as the Menteri Besar; and

D

4.11.3 The Barisan Nasional now has the support of the majority of the members of the Legislative Assembly.

4.12 On 4 February 2009, the Jelapang Assemblywoman lodged a police report at Putrajaya Police Station stating:

E

4.12.1 She did not tender the purported resignation letter to the Speaker; and

4.12.2 The purported resignation letter was invalid, fraudulent and issued on bad faith.

F

4.13 On 4 February 2009, the Election Commission issued a statement that it was unable to establish that there was 'casual vacancy' for the three state seats ie, Behrang, Changkat Jering and Jelapang.

G

4.14 On 4 February 2009 at about 3pm, the DYMM Sultan of Perak received the letters from the Behrang and Changkat Jering Assemblymen and Jelapang Assemblywoman stating that they have lost their confidence in Nizar as the Menteri Besar and they are leaving their respective political parties but maintaining their positions as members of the Legislative Assembly representing their respective constituencies. They declared their support to Barisan Nasional.

H

I

4.15 On 4 February 2009 at about 5.30pm, Nizar had an audience with the DYMM Sultan of Perak, in the present of the State Legal Advisor, at which he made a request to dissolve the Legislative Assembly. The DYMM Sultan of Perak informed Nizar that time was required in order to consider the request for the dissolution of the Legislative Assembly.

4.16 On 5 February 2009 at about 10am, the Deputy Prime Minister, Dato' Seri Mohd Najib bin Tun Abd Razak ("Dato' Seri Najib"), in his capacity as the Chairman of the Perak Barisan Nasional had an audience with the DYMM Sultan of Perak. At the audience Dato' Seri Najib informed DYMM Sultan of Perak that the Barisan Nasional had the command of the majority of the members of the Legislative Assembly and intended to form the Perak State Government. Dato' Seri Najib presented to DYMM Sultan of Perak the letter of support with signatures from 27 members from Barisan Nasional stating that they would support whoever that would be named by Dato' Seri Najib as the candidate for the new Menteri Besar. Dato' Seri Najib also presented to DYMM Sultan of Perak the letters of support for Barisan Nasional from the three independent members of the Legislative Assembly.

4.17 The DYMM Sultan of Perak informed Dato' Seri Najib that he would require proof that the Barisan Nasional had the command of the confidence of the majority of the members of the Legislative Assembly and wished to meet all the Assemblymen who supported the Barisan Nasional.

4.18 On the same day at about 11.15am, Dato' Seri Najib brought in the 31 members of the Legislative Assembly to the Palace.

4.19 The DYMM Sultan of Perak met the 31 members of the Legislative Assembly, where upon they declared before His Royal Highness their support to Barisan Nasional.

4.20 The DYMM Sultan of Perak specifically interviewed the three independent members to ascertain whether they had indeed freely pledged their support to the Barisan Nasional and had lost confidence on Nizar. All three of them

informed DYMM Sultan of Perak that they had signed and pledged their support to the Barisan Nasional voluntarily without any coercion of any party.

4.21 On the same day at about 1pm, Nizar had an audience with DYMM Sultan of Perak at His Royal Highness' invitation. The State Legal Advisor was also present. At the meeting, the DYMM Sultan of Perak informed Nizar that:

4.21.1 His Royal Highness rejected the request for the dissolution of the Legislative Assembly;

4.21.2 Nizar no longer commanded the confidence of the majority of the members of the Legislative Assembly as Barisan Nasional, in His Royal Highness' judgment had the support of 31 members of the Legislative Assembly; and

4.21.3 Under the Perak State Constitution, Nizar shall tender the resignation of the Executive Council and that includes himself.

4.22 Thereafter, Nizar informed the DYMM Sultan of Perak *inter alia* that he was not agreeable with the decision of DYMM Sultan of Perak.

4.23 Later on the same day, the DYMM Sultan of Perak, through His Royal Highness' Private Secretary, issued a press statement which states, *inter alia* as follows:

4.23.1 Nizar was granted an audience by DYMM Sultan of Perak on 4 February 2009 seeking His Royal Highness' consent to dissolve the Legislative Assembly;

4.23.2 Dato' Seri Najib had also requested an audience with DYMM Sultan of Perak in his capacity as the Chairman of the Perak Barisan Nasional;

4.23.3 Dato' Seri Najib had informed DYMM Sultan of Perak that the Barisan Nasional and its supporters, now comprising 31 State Assemblymen, had the majority in the Legislative Assembly;

4.23.4 On the order of DYMM Sultan of Perak to ascertain whether the information given was accurate, all the 31 State Assemblymen were to present themselves before DYMM Sultan of Perak;

4.23.5 After meeting with all the 31 State Assemblymen, the DYMM Sultan of Perak was convinced that Nizar had ceased the command the confidence of the majority of the members of the Legislative Assembly;

4.23.6 That DYMM Sultan of Perak had considered the request of Nizar for a dissolution of the Legislative Assembly and had invoked His Highness' Royal Prerogative under art. XVIII(2)(b) not to dissolve the Legislative Assembly;

4.23.7 Nizar was informed of the decision of DYMM Sultan of Perak and pursuant to art. XVI(6), Nizar and members of his Executive Council were to resign; and

4.23.8 If Nizar and members of his Executive Council did not resign, the post of the Menteri Besar and the Executive Council are deemed to be vacant.

4.24 Nizar, on the same day, wrote a letter to DYMM Sultan of Perak and once again requested for His Royal Highness to dissolve the Legislative Assembly.

4.25 On 6 February 2009, the DYMM Sultan of Perak in accordance with art. XVI(2) of the Perak Constitution, appointed Zambry as the Menteri Besar of Perak.

Judicial Review

[5] On 13 February 2009, Nizar filed the application for judicial review pursuant to O. 53 of the High Court Rules 1980. Basically Nizar was claiming that:

5.1 He had not resigned as the Menteri Besar of Perak and therefore continued to hold office of the Menteri Besar;

A 5.2 No motion of confidence had been tabled against him in the Legislative Assembly to establish that he no longer commanded the confidence of the majority of the members of the Legislative Assembly; and

B 5.3 Since there was no dissolution of the Legislative Assembly, despite his request in his capacity as the Menteri Besar, the DYMM Sultan of Perak was not entitled to declare the position of Menteri Besar vacant pursuant to art. XVI(6) of the Perak State Constitution especially as he
C contends that his application for dissolution was made under art. XXXVI(2).

[6] Nizar also contended that he did not hold the office of Menteri Besar at the pleasure of DYMM Sultan of Perak and
D therefore His Royal Highness could not dismiss him. He further contended that only the Legislative Assembly could decide his fate as the Menteri Besar and it had to be by a vote of no confidence.

[7] On 11 May 2009, the learned High Court Judge allowed Nizar's application for judicial review. He granted the following
E orders:

7.1 A declaratory order that Nizar at all material times was and is the Menteri Besar of Perak;

F 7.2 A declaratory order in respect of art. XVI(6) of the Perak State Constitution that in circumstances where:

7.2.1 The Menteri Besar wished, and had advised for the dissolution of the Legislative Assembly;

G 7.2.2 There was no dissolution of the Legislative Assembly;

7.2.3 There was no motion of confidence taken, and adopted in by the Legislative Assembly against the
H Menteri Besar;

7.2.4 There was no resignation from the post of Menteri Besar of Perak;

whether the post of Menteri Besar may be and/or had
I been vacated.

7.3 A *quo warranto* writ be issued against Zambry ordering Zambry to show cause and to provide information as to how and under what basis or power or authority is Zambry entitled to hold the post of Menteri Besar and to perform and/or carry out and/or discharge the obligations, functions and duties as the Menteri Besar.

7.4 A declaratory order that Zambry is not entitled to and/or does not hold the post of the Menteri Besar and was and is not the Menteri Besar.

7.5 An injunction to restrain Zambry and/or his agents and/or servants from performing and/or carrying out and/or discharging the obligations, functions and duties of the Menteri Besar.

[8] The reasoning of the learned judge in granting the above orders can be summarised as follows:

8.1 The request for the dissolution of the Legislative Assembly by Nizar was made pursuant to art. XXXVI(2) and not pursuant to art. XVI(6) of the State Constitution;

8.2 If Nizar had lost the confidence of the majority of the members of the Legislative Assembly only the Legislative Assembly could determine the issue by a vote of no confidence in the Legislative Assembly. And the DYMM Sultan of Perak was not entitled to interview the members of the Legislative Assembly to ascertain who commanded the majority in the Legislative Assembly.

8.3 Nizar did not hold the office of Menteri Besar at the pleasure of DYMM Sultan of Perak and hence he could not be dismissed and the press statement of 5 February 2009 issued by the Private Secretary of DYMM Sultan of Perak, amounted to the dismissal of Nizar.

8.4 On a true construction of the provisions of the Perak State Constitution and on the facts of the case the DYMM Sultan of Perak was wrong in appointing Zambry as the Menteri Besar as Nizar had not been dismissed and therefore Nizar was entitled to a writ of *quo warranto*.

A 8.5 That the evidence of Nizar was to be preferred to that of the evidence of the Perak State Legal Advisor as to what transpired on 4 February 2009 and 5 February 2009.

Issues

B **[9]** The decision and the reasoning of the learned judge raised three major issues:

9.1 Whether the learned judge was right in holding that the request for the dissolution of the Legislative Assembly by
C Nizar was made under art. XXXVI(2) and not under art. XVI(6) of the Perak State Constitution.

9.2 Whether the learned judge was right in holding that there must be a motion of no confidence passed in the
D Legislative Assembly against Nizar before Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly.

9.3 Whether the learned judge was right in holding that the
E DYMM Sultan of Perak was wrong in appointing Zambry as the Menteri Besar.

Findings

Whether The Request For The Resolution Of The Legislative Assembly
F *Was Made Under art. XXXVI(2) Or art. XVI(6) Of The Perak State Constitution*

[10] Under the Perak State Constitution, the request for dissolution of the Legislative Assembly is found in art. XXXVI(2)
G and art. XVI(6). It reads as follows:

Article XXXVI(2)

(2) His Royal Highness may prorogue or dissolve the Legislative Assembly.

H **Article XVI(6)**

(6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, **unless at his request His Royal Highness dissolves the**
I **Legislative Assembly,** he shall tender the resignation of the Executive Council. (emphasis added)

[11] At the outset, it must be stated that the DYMM Sultan of Perak has the absolute discretion to withhold the consent for a request for the dissolution of the Legislative Assembly, irrespective of whether the request is made under art. XXXVI(2) or art. XVI(6) of the Perak State Constitution. The absolute discretion of His Royal Highness is found in art. XVIII(2)(b). It reads:

> (2) His Royal Highness may act in His discretion in the performance of the following functions (in addition to those in the performance of which He may act in His discretion under the Federal Constitution) that is to say:
>
> (a) the appointment of a Menteri Besar;
>
> (b) the withholding of consent to a request for the dissolution of the Legislative Assembly …

[12] There is a string of authorities which hold that the withholding of consent to a request for the resolution of Parliament or the Legislative Assembly is a Royal Prerogative and is not justiciable. Suffice, that the wise words of Lord Roskill in *Council of Civil Service Union & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 be reproduced as a reminder. It reads:

> … Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grants of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

[13] Even Tuan Hj. Sulaiman, the learned counsel for Nizar conceded that the withholding of consent to a request for the resolution of the Legislative Assembly is a Royal Prerogative and is not subject to judicial review. But he insisted that the request by Nizar to dissolve the Legislative Assembly was made under art. XXXVI(2) and not under art. XVI(6) of the Perak State Constitution. His insistence is obvious as a request under art. XXXVI(2) does not call for immediate resignation of the Menteri Besar and the Executive Council.

[14] The learned judge agreed with Tuan Hj. Sulaiman. He held that it would be reasonable to think that Nizar was seeking His Royal Highness to exercise His Royal Highness Royal Prerogative under art. XXXVI(2) of the Perak State Constitution to dissolve the Legislative Assembly. He thought it was reasonable because the said article was a general provision for dissolution of the Legislative Assembly and also because Nizar's leadership of the Government was never challenged on a vote of no confidence in the Legislative Assembly up to February 2009. Further, he preferred the evidence of Nizar to that of the State Legal Advisor as to what transpired on 4 February 2009 and 5 February 2009.

[15] It is not in dispute that the State Legal Advisor was present when Nizar was having an audience with His Royal Highness on 4 February and 5 February 2009. The State Legal Advisor in his affidavit affirmed on 8 April 2009 deposed that Nizar had informed His Royal Highness that two assemblymen and one assemblywoman have left the Pakatan Rakyat and that there was a political uncertainty as to whether Pakatan Rakyat or Barisan Nasional has the command of the majority of the members of the Legislative Assembly. The State Legal Advisor also deposed that Nizar had requested that the Legislative Assembly be dissolved under art. XVI(6) of the Perak State Constitution. And at the same time Nizar handed to His Royal Highness a proclamation for that purpose to be assented to by His Royal Highness. The State Legal Advisor further deposed that His Royal Highness informed Nizar that His Royal Highness required some time to consider the request by Nizar to dissolve the Legislative Assembly pursuant XVI(6) Perak State Constitution and did not assent to the Proclamation on that day.

[16] Nizar disputed the deposition of the State Legal Advisor. In his affidavit in reply affirmed on 20 April 2009, Nizar averred that during the audience with the Royal Highness on 4 February 2009, he never stated, informed or proposed to His Royal Highness that he had lost the confidence of the majority of the Legislative Assembly and he had never proposed to His Royal Highness for the dissolution of Legislative Assembly pursuant to art. XVI(6) of the Perak State Constitution. Nizar further deposed that the issue as to loss of confidence and the issue of dissolution of the Legislative Assembly pursuant to art. XVI(6) of Perak State

Constitution was never discussed during the brief audience. Nizar further reiterated that during the audience, he informed His Royal Highness that because of the resignation by the three independent Assemblymen, they were no longer members of the Legislative Assembly and had no right to get involved with the business or matters that concern the Legislative Assembly and that all three of them could not be contacted and were "missing". He further averred that he requested His Royal Highness to dissolve the Legislative Assembly as he considered it appropriate and proper to have an election for the Legislative Assembly to overcome the deadlock.

[17] Obviously, there was a conflict between the affidavit evidence of the State Legal Advisor and that of Nizar. To resolve the conflict, the parties agreed to have the State Legal Advisor and Nizar to be cross-examined on their depositions and averments in their respective affidavits. Both Nizar and the State Legal Advisor during the cross-examinations stood their grounds.

[18] The learned judge preferred the version by Nizar that the request for the dissolution on 4 February 2009 was made pursuant to art. XXXVI(2) and that the issue of loss of confidence in the Legislative Assembly was never raised or became an issue when Nizar had the audience with the DYMM Sultan of Perak. In rejecting the State Legal Advisor's evidence, the learned judge stated as follows:

> However with regard to the State Legal Advisor [sic] neutrality in relation to the case, I will take that with a pinch of salt. By his own admission, the State Legal Advisor said that he was instructed to swear the affidavits; and the instruction was from the solicitors who had taken over the respondent case because the solicitors were aware of his knowledge about the events on 4th-6th February 2009. The word 'instruct' or 'instructed' is a strong word. It connotes that when one is under instruction one is under the control or command of another who is more superior. Thus, whatever one does under such instruction may not be out of one [sic] freewill. The State Legal Advisor is a very senior and experienced official and also trained in law. Surely he could have a better choice of word when answering the question by counsel for the applicant whether he i.e. the State Legal Advisor was requested to affirm the affidavit or whether he volunteered to affirm the affidavit because he has knowledge of the events on 4th-6th February 2009. But he choose [sic] to tell the Court that

A he was instructed. To me, that means the State Legal Advisor in affirming the affidavits on instruction of someone else is not completely neutral or impartial. Whatever he deposed in the affidavit would, I think, to certain extend [sic] coloured by the instructions that he received. In another words [sic] in the
B circumstances [sic] the State Legal Advisor may not have applied his independence [sic] mind and judgment as to the facts he disposed in his affidavits. I am of the view because the State Legal Advisor testified under cross examination when he was given the draft proclamation for the dissolution of the State Legislative Assembly soon after the audience with his Royal
C Highness, he did not make any effort to contact the applicant to correct the proclamation. This fact is important. The State Legal Advisor testified he read the draft proclamation (Exhibit PSLA-1 in his affidavit Enclosure 28A) after it was given to him and by then he should have realised that in Exhibit PLSA 1 – the
D applicant made no reference to Article XVI(6), instead the provision of the Perak's State Constitution that was mentioned in Exhibit PSLA 1 was Article XXXVI(2). In the light of the State Legal Advisor [sic] averment in his affidavit that the applicant had requested the dissolution under Article XVI(6) Perak's State Constitution I would think that he would have contacted the
E applicant to point out the mistake in the draft Proclamation and to suggest correction to it so that it would be in accord with the applicant's request for dissolution before His Royal Highness. What is strange is that the State Legal Advisor testified that he did not take that course of action because His Royal Highness
F had not decided on the applicant [sic] request for dissolution. I consider it strange because as Legal Advisor to the State, it is his duty, as provided under Article XXXVI(2) Perak's State Constitution, to advice on all legal matters referred to him by His Royal Highness or the State Government. That, I think, includes to advice the applicant who was then still the Menteri Besar Perak
G and the Chief Executive of the State of Perak on the draft Proclamation. ('sic' by editor)

[19] With utmost respect, the learned judge's criticism that the State Legal Advisor had failed to advise Nizar on the draft
H Proclamation is completely unfounded. On the facts, there was no reason for the State Legal Advisor to examine, correct or take any action on the draft Proclamation at that point in time or thereafter, as His Royal Highness had not decided on the Nizar's request for the dissolution. Under art. XXXVI(2)(b) of the Perak State
I Constitution, 'the State Legal Advisor shall advice on legal matters referred to him by His Royal Highness or the State Government'. In this case, there is no question of the State Legal Advisor failing

to do his duty to the Government of the day as the draft Proclamation was never referred to him. Nizar himself in his evidence during cross examination agreed that he had not sought the advice of the State Legal Advisor in preparing the draft Proclamation. When he was questioned of who prepared the draft Proclamation, his response was:

Q. You presented to the Sultan with draft Proclamation, who drafted it?

A. Saya tak tahu siapa drafted it, ia standard form.

Q. You know what circumstances such proclamation used for.

A. Saya hanya tahu pengisytiharan itu perlu perkenan Sultan untuk bubar DUN.

Q. Did you give Penasihat Undang-Undang a copy of the draft before submitting it to the Sultan prior to the audience on 4.2.2009.

A. Tidak.

Thus, if Nizar did not think it fit to consult the Perak State Legal Advisor on the draft Proclamation how could the State Legal Advisor possibility tender his advice? Clearly, the learned Judge's finding on this issue is perverse and wrong. At the end of it, the draft Proclamation is of not much of a value because Nizar merely picked up a standard form that had not been vetted by the State Legal Advisor.

[20] The learned judge's further criticism on the issue that because the State Legal Advisor used the word 'instructed' to swear the affidavits presumably meant that the State Legal Advisor was instructed by a higher authority is again, a perverse finding. The mere usage of the word 'instructed' to affirm the affidavit cannot be used as the basis of doubting the evidence of a witness and in this case, the State Legal Advisor. What is required of the learned judge is for him to evaluate the evidence of this case as a whole. The conflicting evidence of Nizar and the State Legal Advisor must be tested against the uncontroverted documentary evidence adduced in this case.

[21] It is trite law that when there is a conflict between the evidence of two witnesses, the court would resolve the conflict by relying on the uncontroverted documentary evidence which is neutral in nature. In *Tindok Besar Estate Sdn Bhd v. Jujur Co* [1979] 2 MLJ at p 229, Chang Min Tat FJ has this to say:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with the purpose of his own to serve and if it did not account for the statements in his documents and writing. Judicial reception of evidence requires that oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

[22] In *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257, Lord Goff of Chiveley in delivering the judgment of the Privy Council, speaking on the same subject held that it is of crucial importance for judges to have regard to the contemporary documents and to the overall probabilities when facing the task of assessing the evidence of witnesses. (See also *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24, *Eastern & Oriental Hotel [1951] Sdn Bhd v. Ellarious George Fernandez & Anor* [1988] 1 LNS 161, *Tan Sooi Shin v. Kow Kek Hing (1)* [1991] 3 CLJ 1895; [1991] 4 CLJ (Rep) 107 and *Kumagai Gumi Co Ltd v. Zenecon – Kumagi Sdn Bhd* [1994] 2 MLJ 789).

[23] In the present case, the letter dated 5 February 2009 authored by Nizar himself and the media statement by the office of His Royal Highness bear out the undisputed fact that Nizar's request for dissolution was made because he had lost the command and support of the majority members of the Legislative Assembly. Both documents lend support to the State Legal Advisor's evidence that Nizar had sought the dissolution of the Legislative Assembly under art. XVI(6) of the Perak State Constitution.

[24] The pertinent part of Nizar's letter to His Royal Highness dated 5 February 2009 reads as follows:

... Patik mohon izin untuk menyembahkan beberapa perkara:

1. Artikel XVI(6) Undang-Undang Perlembagaan Negeri Perak menyatakan bahawa "If the Menteri Besar ceases to command the confidence of the majority of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he should tender the resignation of the Executive Council". Ini bermakna sokongan Menteri Besar itu perlu diputuskan oleh Persidangan Dewan Undangan Negeri.

2. Jumlah Ahli Dewan Undangan Negeri Pakatan Rakyat dan Barisan Nasional adalah sama iaitu 28 orang. Adalah kurang tepat andaian Barisan Nasional mempunyai majoriti. YB Yang Di Pertua Dewan Undangan Negeri Perak telah memutuskan bahawa ADUN bagi kawasan Behrang, Changkat Jering dan Jelapang bukan lagi ADUN. YB Yang Di Pertua Dewan Undangan Negeri Perak dan Kerajaan Negeri Perak juga telah memfailkan satu permohonan untuk satu pengisytiharan bahawa ketiga-tiga ADUN berkenaan bukannya ADUN untuk kawasan-kawasan tersebut di Mahkamah Tinggi pada pagi ini. Sewajarnya kita menunggu keputusan Mahkamah dalam kes tersebut.

Ampun Tuanku,

Atas alasan di atas dan berdasarkan prinsip demokrasi dan Raja Berperlembagaan Patik dengan ini merafa' sembah memohon agar Dewan Undangan Negeri dibubarkan bagi membolehkan rakyat memilih semula kerajaan yang dikehendaki mereka.

[25] The media statement issued by the office of His Royal Highness on 5 February 2009 *inter alia* reads as follows:

YAB Dato' Seri Ir Haji Mohammad Nizar bin Jamaluddin telah dititah mengadap Baginda untuk dimaklumkan mengenai keputusan Baginda tidak membubarkan Dewan dan selaras dengan Peruntukan XVI(6) Undang-Undang Tubuh Kerajaan Perak Darul Ridzuan, DYMM Paduka Seri Sultan Perak menitahkan YAB Dato' Seri Ir Mohammad Nizar bin Jamaluddin meletak jawatan sebagai Menteri Besar Perak bersama-sama ahli-ahli Majlis Kerajaan (MMK) berkuatkuasa serta merta.

[26] It is clear from the above uncontroverted documentary evidence that the request for the dissolution of the Legislative Assembly must have been made under art. XVI(6) of the Perak State Constitution. Moreover, state of events that led to the

A decision of His Royal Highness not to dissolve the Legislative Assembly, does not support Nizar's claim that he had requested the dissolution of the Legislative Assembly under art. XXXVI(2) of the Perak State Constitution.

B **[27]** It is an undisputed fact that the Pakatan Rakyat Government at its formation had a three seat majority in the Legislative Assembly. Thus, when the two Assemblymen of Pakatan Rakyat from PKR on 1 February 2009 declared that they were leaving the party and crossing support to the Barisan Nasional, Nizar must be C concerned of his position. Nizar quickly had an audience with His Royal Highness on 2 February 2009, to inform His Royal Highness that the two Assemblymen had in fact resigned. But by that time the two Assemblymen had openly disputed the fact they have resigned as members of the Legislative Assembly.

D **[28]** On 3 February 2009, another bombshell hit Nizar. This time an Assemblywoman from DAP announced her decision to leave DAP, a political party aligned to Pakatan Rakyat. She too had disputed the claim by the Speaker that she had resigned as a member of the Legislative Assembly. She openly declared that she E no longer supported Nizar as the Menteri Besar, instead she was supporting Barisan Nasional.

[29] The above was the state of affairs when Nizar had an audience with His Royal Highness at 5.30pm on 4 February 2009, F where he made the request to dissolve the Legislative Assembly. At that time he could not credibly dispute the fact that he had lost the support of the majority of the members of the Legislative Assembly as the Barisan Nasional consisting 28 members with the support of three independent members had a total of 31 members, G while Pakatan Rakyat had 28 members. On these undisputed facts, how could he possibly claimed that his request to dissolve the Legislative Assembly was under art. XXXVI(2) the Perak State Constitution.

H **[30]** Article XXXVI(2) is a general provision. A request for dissolution under this Article, have to be in relation to the conclusion of the five years term of the Legislative Assembly when a General Election is contemplated. It is a well known fact that the General Election had been held barely one year ago. Hence, I the learned judge's finding that the request by Nizar for the dissolution of the Legislative Assembly was under art. XXXVI(2)

cannot be supported. On the facts of this case, the request could only have been made in accordance to art. XVI(6) of the Perak State Constitution.

Whether The Learned Judge Was Right In Holding That There Must Be A Motion Of No Confidence Passed In The Legislative Assembly Against Nizar Before Nizar Ceases To Command The Confidence Of The Majority Of The Legislative Assembly

[31] This is the crucial issue. The learned judge held that the loss of confidence of the majority of the members of the Legislative Assembly on the Menteri Besar could only be determined by a vote of no confidence in the Legislative Assembly. He said it in the following words:

> In this case it is very easy to be swayed by the fact that His Royal Highness has satisfied himself as to whom has command of the majority in the State Legislative Assembly and to conclude that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly. But the stark fact is that there never was any vote of no confidence taken against the applicant in the State Legislative Assembly and the applicant had not come to His Royal Highness to request dissolution because he had lost command of the majority. So how could one say that the applicant has ceased to command the confidence of the majority in the State Legislative Assembly for the purpose of Article XVI(6) Perak's State Constitution.

[32] With utmost respect, I disagree. Under art. XVI(6) there is no mandatory and/or express requirement that there must be a motion of no confidence passed in the Legislative Assembly against a Menteri Besar before he ceases to command the confidence of the majority of the members. The fact that a Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly can be established by other means. It cannot be solely confined to the vote taken in the Legislative Assembly.

[33] In this respect I am in agreement with the decision of Abdul Kadir Sulaiman J (as he then was) in *Datuk (Datu) Amir Kahar bin Tun Dato' Haji Mustapha v. Tun Mohd Said bin Keruak & Ors* [1995] 1 CLJ 184 *(Amir Kahar)*. What happened in that case was this. Following the February 1994 state election in Sabah, Parti Bersatu Sabah (PBS) under Pairin was returned with 25 of

A the 48 seats in the State Legislative Assembly. Barisan Nasional under Sakaran Dandai won the other 23 seats. Pairin was appointed as the Chief Minister, and shortly thereafter his Cabinet was also appointed.

B **[34]** Soon after his appointment, moves were began to unseat Pairin. On 13 March he learnt of the defection of three PBS Assemblymen, which turned his majority of the elected members into a minority. On the same day, he requested the Yang di-Pertua Negeri for the dissolution of the Assembly. The Yang di-
C Pertua Negeri refused. Subsequently 30 members of the Assembly presented a signed petition to the Yang di-Pertua Negeri, stating that they had no confidence in Pairin. Pairin resigned, without having been any vote or motion of no confidence passed against him in the Assembly. By that time he had only 21 votes in the
D Assembly as against 27 for the Barisan Nasional. Sakaran Dandai was accordingly appointed the Chief Minister and a new Cabinet was also appointed.

[35] In his judgment, Abdul Kadir Sulaiman J in interpreting the
E relevant provisions of the Sabah State Constitution including Article 7(1) which is in *pari materia* with art. XVI(6) of the Perak State Constitution held at p 197 that:

> ... the evidence that a Chief Minister ceases to command the confidence of the majority of members of the Assembly for the
F purpose of Article 7(1) of the Sabah Constitution, may be found from other extraneous sources and are not confined to the votes taken in the Assembly provided that, that extraneous sources are properly established. In this case, that extraneous source is to be found in the clear expression contained in the petition by the 30 members to the 1st defendant and the admission of that fact by
G Datuk Pairin. This clear expression suffices for the 1st defendant to exercise his discretion under Article 6(3) to appoint the 2nd defendant as the new Chief Minister to replace Datuk Pairin which issue in any event is not contested by the plaintiff. **The expression of loss of confidence is not,** therefore, confined to
H the vote taken in the Assembly but depending on the circumstances which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or lack of it must be by way of vote taken in the Assembly itself. If it is the intention of the framers
I of the Constitution that it be so then an express provision to that effect would have been so provided.

[36] Similarly, in the present case there is nothing in the Perak State Constitution which can be construed as requiring that the test of confidence or lack of it must be by way of vote taken in the Legislative Assembly. Of course, actual voting in the Legislative Assembly is ideal but interpreting art. XVI(6) to require the loss of confidence to be established only by voting in the Legislative Assembly would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it. Thus, as rightly stated by Kadir Sulaiman J in *Amir Kahar* that there must be other circumstances, which are capable of contributing sufficient evidence to such lack of confidence in Chief Minister or the Menteri Besar.

[37] In the present case, the circumstances clearly shows that on the 5 February 2009 Nizar no longer had the confidence of the majority of the members of the Legislative Assembly. There were signed letters from 31 members of the Legislative Assembly pledging support to the Barisan Nasional which were presented to the DYMM Sultan of Perak. The 31 members presented themselves before His Royal Highness, whereby they personally informed His Royal Highness of their support to the Barisan Nasional.

[38] It is an undisputed fact that His Royal Highness interviewed the three independent members separately in order to ascertain whether they were really supporting Barisan Nasional. They informed His Royal Highness that they no longer supported Nizar as the Menteri Besar. Instead they declared their support to Barisan Nasional. At the end of it, His Royal Highness was satisfied that with the 31 members of the Legislative Assembly supporting the Barisan Nasional, Nizar no longer command the confidence of the majority of the members of the Legislative Assembly.

[39] The learned judge however in holding that the phrase 'cease to command the confidence of the majority of the members of the Legislative Assembly' under art. XVI(6) 'ought to be construed as to have ceased to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly' chose to follow and adopt the case of *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 *(Ningkan)*.

[40] In *Ningkan*, twenty-one of the 42 assemblymen petitioned to the Sarawak Governor that they no longer had confidence in Ningkan as the Chief Minister of Sarawak. The Governor then asked Ningkan to resign. Ningkan refused to resign. The Governor then declared Ningkan and all the members of the Supreme Council as having ceased to hold office. A new Chief Minister was appointed by the Governor.

[41] The case ended up in the High Court. The High Court held that:

41.1 the Governor could not dismiss the Chief Minister;

41.2 the only way for a Chief Minister to be dismissed was by way of a vote of no confidence in the Council Negeri; and

41.3 a Governor could not appoint a second Chief Minister while there was still one in office.

[42] It was submitted by Tuan Haji Sulaiman, that since the issues in the present case as well as the relevant provisions in the Perak State Constitution were substantially identical to that of *Ningkan*, the learned judge was right to adopt and apply the decision of *Ningkan* to the present case.

[43] With utmost respect, I disagree. Though art. 7(1) of the Sarawak Constitution is in *pari materia* with XVI(6) of the Perak State Constitution, I take a different view. To me, art. XVI(6) is entirely clear and free of ambiguity. The article requires the Menteri Besar to tender the resignation of the Executive Council (which by definition, includes himself) if the Menteri Besar 'ceases to command the confidence of the majority of the members of the Legislative Assembly'. There is no option for the Menteri Besar, who does not command the confidence of the majority of the members of the Legislative Assembly to remain in office. He shall tender his resignation and the resignation of the Executive Council.

[44] The word 'shall' in Article XVI(6) of the Perak State Constitution must be interpreted as being 'mandatory'. Any other meaning would create an absurdity to parliamentary democracy, as it would permit an individual such as Nizar to remain in office notwithstanding that he had ceased to command the confidence of the majority of the members of the Legislative Assembly.

[45] I am also constrained not to follow *Ningkan* as it is distinguishable from the facts of the present case. First, in *Ningkan*, the Assembly was in session. On 14 June 1966, two days before the dismissal of Ningkan by the Governor, Bills were passed in the House without opposition. A motion of no confidence was never introduced in the House. And there was no request for dissolution by Ningkan of the Council Negeri. But in the present case the Legislative Assembly was not in session and there was a request by Nizar for the dissolution of the Legislative Assembly. Thus, a vote on the floor of the Legislative Assembly was therefore, not possible.

[46] Secondly, in *Ningkan*, the Governor made his judgment based on a letter signed by 21 members of the Assembly. The said letter was marked 'Top Secret' with the 21 names in the list attached to the said letter. Against the 21 names were signatures, and in one case the signature was just a chop. This indicates bad faith. In the present case, besides the letters of support to the Barisan Nasional by the 31 Assemblymen, the DYMM Sultan of Perak had personally on 5 February 2009 interviewed all the 31 members of the Legislative Assembly, who had pledged their support to the Barisan Nasional. In fact, His Royal Highness thereafter met with the three independent members separately to satisfy His Royal Highness that these three individuals had freely pledged their support to the Barisan Nasional. The three independent members had clearly indicated to His Royal Highness that they no longer support Nizar as the Menteri Besar. With the three independent members shifting their support to Barisan Nasional, Nizar lost his majority in the Legislative Assembly.

[47] For the above reasons, I find that the learned judge had erred in law in concluding that the only manner in which the loss of confidence of the majority of members of the Legislative Assembly could only be ascertained by way of motion to be passed in the Legislative Assembly. Such a finding is contrary to the provisions of art. XVI(6) of the Perak State Constitution which make no reference to such a motion having to be tabled.

Whether The Learned Judge Was Right In Holding The DYMM Sultan of Perak Was Wrong In Appointing Zambry As The New Menteri Besar Of Perak

[48] The appointment of Menteri Besar is provided for under art. XVIII(2)(a) of the Perak State Constitution which provides as follows:

> (2) His Royal Highness may act in his discretion in the performances of the following function (in addition to those in the performance of which he may act in his discretion in the Federal Constitution) that is to say:
>
> (a) the appointment of a Menteri Besar;
>
> (b) …

[49] Literally, it means that His Royal Highness has the right to appoint an individual who in His Royal Highness' judgment, has the command or support of the majority of the members of the Legislative Assembly. From the facts of this case as narrated earlier, the Barisan Nasional led by Zambry had the command or support of the majority of the members of the Legislative Assembly. Hence, his appointment as the Menteri Besar of Perak by the DYMM Sultan of Perak was in accordance with the Perak State Constitution.

[50] The question of Perak having two Menteri Besars does not arise. Article XVI(6) of the Perak State Constitution and established convention, demand that once the Menteri Besar is made to know that he has lost the confidence of the majority of the members of the Legislative Assembly, he should take the honourable way out by tendering his resignation and the resignation of the Executive Council. If the Menteri Besar refuses or does not tender his resignation and the resignation of the Executive Council, as had happened in this case, the fact remains that the Executive Council is dissolved (which include the Menteri Besar) on account of the Menteri Besar losing the confidence of the majority of the members of Legislative Assembly. Therefore, it is not necessary for the DYMM Sultan of Perak to remove the Nizar and the other members of the Executive Council. The DYMM Sultan of Perak in exercise of His Royal Prerogative under art. XVI(2)(a) of the Perak State Constitution is at liberty to appoint another Menteri Besar to replace Nizar. But His Royal

Highness must appoint someone who has the command and the confidence of the majority of the members of the Legislative Assembly. In the present case, there is no doubt that Zambry has the majority support of the members of the Legislative Assembly. He has the support of 31 members from 59 members of the Legislative Assembly.

[51] Thus, in the circumstances of this case, the appointment of Zambry as the Menteri Besar of Perak was made in accordance to Perak State Constitution and established democratic practice and convention.

Conclusion

[52] As demonstrated above, the learned judge had clearly erred in his interpretation of the relevant provisions of the Perak State Constitution in particular art. XVI(6). The law on interpretation of our Constitution is well settled. Raja Azlan Shah J (as His Royal Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90 held that:

> Whatever may be said of other Constitution, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording 'can never be overridden by the extraneous principles of other Constitutions – see *Adengbenro v. Akintola & Anor.* Each country frames its Constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well-being is ensured by the fundamental law.

[53] The above sentiment was echoed by Abdul Hamid Mohamad PCA (as he then was) in the Federal Court case of *Public Prosecutor v. Kok Wah Kuan* [2007] 6 CLJ 341 where he said:

> So, in determining the constitutionality or otherwise of the statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfuther J said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187. 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'.

A **[54]** The learned judge did refer to the above two judgments but failed to apply the principles. He completely failed to give effect to the plain, ordinary and unambiguous meaning of the provisions of the Perak State Constitution, in particular art. XVI(6).

B **[55]** It is also abundantly clear, from the grounds of judgment of the learned judge, that he failed to properly and adequately appreciate the evidence adduced before him. He had also failed to appreciate the undisputed facts and the chronology of events as illustrated in the early part of this judgment which led to the C appointment of Zambry as the Menteri Besar by the DYMM Sultan of Perak.

[56] The failure of the learned judge as stated above had resulted that his judgment being plainly wrong. In the circumstances, the appeal by Zambry must be allowed. The orders of the High Court D is therefore set-aside. As Zambry is not pressing for costs, there is no order as to costs. But the deposit of this appeal is to be refunded to Zambry.

Zainun Ali JCA:

E

[57] The political convulsion that has gripped Perak since February 2009, has ripped apart notions of sanctity of the Constitution and the rule of law as we know them.

F **[58]** If only Dicey's warning of the danger of not paying "sufficient attention to the Law of the Constitution as it actually exists" had been heeded, this unfortunate crisis might have been averted.

[59] As it were, the political situation worsened and came to a G head when the respondent filed his suit against the appellant. In the end, it came down to the question of whether the Constitution governs the conduct of political parties or do the parties govern the conduct of the Constitution?

H **[60]** I believe it is important to indicate at the outset that the reality of any Constitution is in itself complex. I find that in hearing and deciding this appeal, this court, in attempting to find the right legal answer, has to contend with a multitude of facets found in both the Perak and Federal Constitutions.

I

[61] In this search, I find that the conservative legal scholarship no longer works. I have to transcend that method and approach both the Constitutions (Perak and Federal) against the historical background and framework of society. This would provide a clue to the actual repository of power and how they operate. It is only then would a proper understanding of the dynamics of public and private power be obtained.

[62] In this judgment I will refer to His Royal Highness the Sultan of Perak as "His Royal Highness", the appellant as "Zambry" and the respondent as "Nizar". Further, unless otherwise stated, any reference to "Article" or "Articles" means "Article or Articles in the Laws of the Constitution of Perak" ("the Perak State Constitution"). I shall also refer the Perak State Legislative Assembly as "Legislative Assembly".

[63] I have had the advantage of reading in draft the judgment by my learned brothers Raus Sharif, JCA and Ahmad Maarop, JCA; I agree with their judgment and agree that this appeal be allowed and the judgment of the High Court be set aside. However I would like to add a view of my own. This is therefore a supplementary judgment.

[64] The facts of this appeal including the events leading up to Zambry's appointment as Menteri Besar have been comprehensively set out in the judgment of my learned brother Raus Sharif JCA. However, I will be recounting parts of them for the purpose of establishing certain facts deemed crucial in the instant appeal.

The Appeal

[65] What we have before us is an appeal against the decision of the learned trial judge who allowed Nizar's application for judicial review on 11 May 2009. The learned trial judge allowed Nizar's application in respect of Prayers (1)(a), (b), (c) and (e) thereof.

[66] Briefly the judgment of the High Court is that:

(i) That the request for dissolution by Nizar was made pursuant to art. XXXVI(2) and not pursuant to art. XVI(6) of the Perak State Constitution;

A (ii) that in interpreting the provisions of the Perak State Constitution in particular arts. XVI(6) and XXXVI(2), the learned judge referred to the decisions in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90 and *Public Prosecutor v. Kok Wah Kuan* [2007] 6 CLJ 341 and held that
B art. XVI(6) did not entitle the DYMM Sultan of Perak to decide that the position of the Menteri Besar was vacant;

(iii) the learned judge was of the view that if Nizar is said to have lost the confidence of the majority of the members of
C the Legislative Assembly only they could determine the issue by a vote of no confidence in the Legislative Assembly;

(iv) the learned judge preferred the decision in *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 to that of *Datuk (Datu) Amir Kahar bin Tun Datu Haji*
D *Mustapha v. Tun Mohd Said bin Keruak & Ors* [1995] CLJ 184 and *Adegbenro v. Akintola* [1963] 2 WLR 63;

(v) that His Royal Highness was not entitled to interview the various members of the Legislative Assembly on 5 February
E 2009 to ascertain who commanded the majority in the Legislative Assembly. That was a matter for the Legislative Assembly;

(vi) that Nizar did not hold the office of Menteri Besar at the
F pleasure of the His Royal Highness and hence he could not be dismissed and the Press Statement of 5 February 2009 issued by the Private Secretary of His Royal Highness on the Sultan's behalf amounts to Nizar's dismissal;

G (vii) that on a true construction of the provisions of the Constitution and that on the facts of this case, His Royal Highness was wrong in appointing Zambry as Menteri Besar as Nizar had not been dismissed and therefore Nizar was entitled to a writ of *quo warranto*;

H (viii) that Nizar's evidence is to be preferred to that of the evidence of the Perak State Legal Advisor as to what actually transpired on 4 February 2009 and 5 February 2009.

I

[67] The position taken by Nizar had consistently been that "Under art. XVI(7) and subject to art. XVI(6) the Menteri Besar does not hold office at His Royal Highness' pleasure, but hold office subject to the confidence of the members of the Legislation Assembly to whom the Menteri Besar is responsible. As such the Menteri Besar cannot be dismissed (or the office 'rendered' vacant) by His Royal Highness. The Menteri Besar may only be dismissed after a vote of no confidence passed against the Menteri Besar by the members of the Legislative Assembly. There is prevailing and strong precedent supporting this position."

[68] Nizar contended that even if he had lost command of the confidence of the majority of the members of the Legislative Assembly then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council only and that the above resignation does not include himself. The much disputed provision in the Perak State Constitution ie, art. XVI(6) reads as follows:

> (6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

[69] Nizar stated that nowhere in his letters of 4 February 2009 (exh. MNJ5) and 5 February 2009 (exh. MNJ6) to His Royal Highness, was it expressed that his request for dissolution was made pursuant to any particular provision of the Perak State Constitution.

[70] The learned judge in his judgment was very much in accord with Nizar's view in that none of the above letters either explicitly or implicitly indicated under which particular provision of the Perak State Constitution was the request for dissolution made to His Royal Highness.

[71] He went on to point out that "the letter is a general request to His Royal Highness to exercise His Royal Highness's Royal Prerogative to dissolve the State Legislative Assembly in the light of the recent development in the political scene of Perak as deposed to in Nizar's affidavit in support."

[72] The learned judge then went on to discuss the two provisions relating to the request for both dissolution of the Legislative Assembly ie, arts. XXXVI(1) & (2) of the Perak State Constitution. Article XXXVI(1) & (2) which read:

> (1) His Royal Highness shall from time to time summon the Legislative Assembly and shall not allow six months to elapse between the last sitting in one session and the date appointed for its fist sitting in the next session.
>
> (2) His Royal Highness may prorogue or dissolve the Legislative Assembly.

[73] The learned trial judge observed that:

> Article XXXVI(2) above is the general power given to His Royal Highness to prorogue or dissolve the Legislative Assembly. The Article is silent as to the time or reason for doing so. The power is exercised at the absolute discretion of His Royal Highness and may be executed at any time on the advice of the MB Perak.

[74] The learned judge went on to say that in the absence of reference to any specific provision of the Perak State Constitution by Nizar in his letter of MNJ5 to His Royal Highness, requesting His Royal Highness' consent for the dissolution of the Legislative Assembly, it would be reasonable to think that Nizar was appealing to His Royal Highness to exercise His Royal Highness' Royal Prerogative under art. XXXVI(2) of the Perak State Constitution to dissolve the Legislative Assembly to overcome the 'deadlock' of having no clear majority by either the PAKATAN or Barisan Nasional in the Legislative Assembly.

[75] The learned judge based his reasoning above on the premise that art. XXXVI(2) is a general provision for dissolution of the Legislative Assembly. He went on to say that it is evident that Nizar's leadership of the government was never challenged on a vote of no confidence in the Legislative Assembly up to 4 February 2009.

[76] The learned judge concluded that the request for dissolution by Nizar was never made pursuant to art. XVI(6) of the Perak State Constitution but under art. XXXVI(2); that it was clear from the language of art. XVI(6) that His Royal Highness was not entitled to decide that the position of the Menteri Besar was vacant.

[77] From the above, three major issues could be indentified for this court's consideration. Each will be addressed accordingly. A

[78] The emerging issues as would be unfolded later in this judgment are replete with substantive constitutional importance, some of which make for novel points of law. B

[79] A brief outline of the essential features of the Federal Constitution will be useful. This is because much of what is found in the Federal Constitution are reflected in the State Constitution.

[80] Inclined as is the Federal Constitution towards the Westminster structure, it has its own peculiarities. The Westminster model is not to be found in one document, but could be seen in bits and pieces in the Magna Carta, the Bill of Rights, the Act of Settlement and a series of Parliament Acts. Conversely, the Federal Constitution however is embodied in one document and gathers unto itself various sources of law some of which are implicit. The unique presence of the written law, shot through with informal and unwritten sources in the form of conventions, prerogatives, discretionary and residual powers as such, help ensure the continuation of constitutionalism and the rule of law. Thus the sources of law in our Constitution are several. Article 160(2) of the Federal Constitution says it all. "Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof." C D E F

[81] In declaring the Constitution supreme, Malaysia also opted for the Federal System. Though there is hefty power at the centre, the various States retain their own Constitution and a measure of autonomy, including those found in the State List. By virtue of Part I of the Eight Schedule of the Federal Constitution, all State Constitutions must contain certain 'essential provisions' found in the Federal Constitution. G

[82] A cursory glance at the Reports and Agreements made prior to establishing the Merdeka Constitution, would manifest that strong elements of compromise and understanding was the order of the day. Malaysia had chosen a federal polity primarily to preserve the sovereignty of the Malay Sultans in their respective H I

A States. The concept of Constitutional Monarchy with their concomitant limitations, as well as powers, privileges and prerogatives is still very much alive.

[83] Quite simply, my reason for revisiting these fundamental
B ideas is to allow the concepts which the framers of our Constitution in their wisdom had formulated to be more transparent. In connection with the Federal and State Constitutions therefore, the concepts as sketched by Montesquieu in his separation of powers theory, as propounded earlier by John
C Locke, and the rule of law as drawn up by Dicey, need to be appraised once again with sincerity, in the context of the instant appeal. It is only then that the burgeoning issues identified herein could be appreciated. It would also help to remember that our Constitution is based on the concept of the reasonable man.

D

First Issue

The First Issue Is Whether The Request For The Dissolution Of The Legislative Assembly Was Made Under art. XXXVI(2) Or art. XVI(6)

E **[84]** The answer to this question is tied up with the issue of what were the facts and circumstances leading to Nizar's request made to His Royal Highness on 4 February 2009 and 5 February 2009, for the dissolution of the Legislative Assembly. It is Nizar's contention that in the light of events prior to his 'dismissal' the
F burden of proving that it was made under art. XVI(6) lies on Zambry. It is of course Nizar's case that Zambry had not overcome this burden cast on him.

[85] Since this is a determinative issue, it is critical that the
G surrounding facts and circumstances culminating in the request being made by Nizar, are properly established. The establishment of this fact is more critical than one might think. It would reflect one way or the other why such request was made and the effect and consequence of the request being either withheld or granted.

H **[86]** The importance of establishing this fact, cannot be understated for it goes towards Zambry's interpretation of events. Zambry is of the view that if (a) *the Menteri Besar ceases to command the confidence of the majority of members of the State Legislative Assembly* and (b) *His Royal Highness withholds his consent to dissolve the*
I *Legislative Assembly*, then *Nizar cannot remain in office*. In that situation, he shall tender the resignation of the Executive Council (which Zambry argued, includes Nizar himself). (emphasis added).

[87] It can safely be said that the beginning of the end for Nizar started on 1 February 2009 when the Speaker announced that two Assemblymen from Behrang and Changkat Jering had tendered their resignation as Assemblyman of their respective seats.

[88] The two Assemblymen's response came fast and furious. Their withdrawal of the purported resignation came on the same day in separate letters to the Speaker, the Secretary of the State of Perak, the Perak State Legal Advisor, the Secretary of Legislative Assembly and the Director of the State of Perak. The duo also sent similar letters separately on the same day to His Royal Highness, with an additional paragraph. The said paragraph indicated that they have withdrawn their purported resignation and that they are still very much Assemblymen in their respective constituencies and are performing their duties as such.

[89] The two Assemblymen lodged separate police reports on 2 February 2009.

[90] On 2 February 2009, Nizar had an audience with His Royal Highness, to inform His Royal Highness of the latest political development in Perak. As can be seen later, Nizar was steadfast in his evidence that at this audience, he was unaware of the withdrawal of resignation of the two Assemblymen. Is this credible? The unfolding events would throw light on this question.

[91] The next day saw a flurry of activities. Firstly, the two Assemblymen wrote separate letters to the Speaker and the President of the PKR, to declare that they were disenchanted with the party; that they had no more confidence in PKR, culminating in their denouncing their membership in PKR with immediate effect; however they claimed that their leaving PKR does not operate as a resignation of their membership in the Legislative Assembly.

[92] Before the effect of the above letters of the duo could sink in, on the same day ie, 3 February 2009, the DAP Assemblywoman from Jelapang Madam Hee Yit Foong purportedly resigned her post as a member of the Legislative Assembly. Similarly, her withdrawal from this position came swiftly in the same manner as happened in the case of the two Assemblymen. And true to form, Madam Hee sent a replica of the letters sent by her comrades (from Behrang and Changkat Jering) to the Speaker and the

A Secretary to the DAP, renouncing her membership with the DAP with immediate effect and that she has lost confidence in her political party (DAP).

[93] More importantly, she reiterated that her departure from
B the party does not operate as a resignation of her membership in the Legislative Assembly.

[94] Then the trio (The Assemblymen of Behrang, Changkat Jering and Jelapang, hereinafter referred to as "the Three ADUNs) caused separate letters to be sent to His Royal Highness, dated
C 3 February 2009 indicating that they have lost confidence in Nizar; that they will not support him as the Menteri Besar of Perak and that the Barisan Nasional alliance now has the support of the majority of the members of the Legislative Assembly.

D **[95]** The next day, 4 February 2009 was equally tumultuous. It began with the Election Commission declaring in a print media (The New Straits Time) their decision that it is established that the seats for the two States parliamentary seats, ie, Behrang, Changkat Jering are not vacated. (exh. ZAK16).

E

[96] Some confusion over this document (Tab 31 of core bundle) arose. Perusing this exhibit "exh. ZAK16", carefully, it would appear that it started off with the Speaker's letter to the Perak Election Commission director, Encik Ahmad Adli Abdullah
F which said:

> … There was one letter saying they had resigned, and then came another letter from the same persons, which said they had not.
>
> It is due to this doubt created over the validity of the first letter
G that the Election Commission cannot exercise its powers under Article 36(5) of the Perak State Constitution to establish a 'casual vacancy' for the two State seats.

[97] From my understanding of this ambiguous reporting in the print media, what it means to say is that, it was the Speaker who
H 'ordained' that due to the questionable nature of the first letter, it would be impossible for the Election Commission to establish that a 'casual vacancy' exists for the two State seats.

[98] However, despite the Speaker's view, it was reported in
I the same report that Tan Sri Abdul Aziz Mohd Yusof the Chairman of the Election Commission, nevertheless ruled that:

It is hence declared that the seats will be retained by the two Assemblymen.

[99] Tan Sri Aziz was then reported to have said that while the Perak State Constitution allows an Assemblyman to resign by writing to the Speaker, who would then inform the Election Commission, **no one else** but the Election Commission could declare a seat vacant. (emphasis added).

[100] Tan Sri Aziz went on to say that once the Election Commission gets a notice from the Speaker for a 'casual vacancy' the Election Commission has to establish whether the notice can be put into effect. Tan Sri was reported to have said that "... As far as we are concerned, that is all there is to it. **Our decision is made and we have ruled that the seats are not vacant**". (emphasis added).

[101] My labouring this point will not be in vain. Firstly the hazy and indeterminate reporting in the print media appears to have caused members of the public unnecessary confusion as to what is the exact political situation. Even Nizar would have us believe that he was not spared being confused in the sense that he was unbending in the belief that the Speaker had stated that the two States seats are vacated. Whether this is a legitimate claim or otherwise will be shown up.

[102] Secondly it is crucial to determine that on the morning of 2 February 2009, what was the exact status with regards the two State seats of Behrang and Changkat Jering?

[103] Obviously their exact status (whether there was 'casual vacancy' or not) would have a direct bearing on the consequent conduct of the main parties in this appeal. This neat point would indicate the circumstances which would provide the factual evidence needed to establish whether or not Zambry has failed or succeeded in proving the facts leading to his assertion that the request was made under art. XVI(6). Thus, the importance of establishing this fact has high intrinsic merit. I believe this is part of the 'trigger issue' as stated by Nizar's eminent lead counsel, Tn. Hj. Sulaiman Abdullah.

[104] As a matter of interest, art. XXXVI(5) was amended in 1969 to give power to the Election Commission to establish the existence or otherwise of a 'casual vacancy' for any seat in the constituencies of Perak. Previous to this, the relevant article was silent as to which authority was so empowered.

[105] A quick reference to other State Constitutions would show that it is not in every State Constitution that the Election Commission prevails itself. For example, art. 55(5) of the Perlis State Constitution and art. 19(5) of the Malacca State Constitution are identical to the Perak State Constitution, in that a 'casual vacancy' is to be determined or established by the Election Commission. However art. 56(5) of the Negeri Sembilan State Constitution and art. 44(5) of the Terengganu State Constitution are silent as to which authority determines the question of 'casual vacancy'.

[106] Undoubtedly the determination by the Election Commission as to whether a 'casual vacancy' is created or not is significant. As the Supreme Court decided in *Noordin Salleh v. State Legislative Assembly in Kelantan* [1993] 3 MLJ 344, a defection by an Assemblyman to another political party does not have the effect of his seat in the Assembly being vacated. If a 'casual vacancy' is established by the Election Commission, it would have the effect of a by-election being required to be held within 60 days.

[107] Significantly, it is Nizar's position that regardless of the withdrawal of the resignation letter by the three ADUNs, the Speaker had determined that they had resigned and thereafter their seats in the Legislative Assembly are vacated, warranting a by-election. In this, Tn. Hj. Sulaiman's argument for Nizar is that the Speaker's decision on this issue prevails. How this assertion reconciles with the power of the Election Commission in art. XXXVI(5) was not made known to us by Tn. Hj. Sulaiman.

[108] With the above background, on 4 February 2009, Nizar dispatched a letter 'exh. MNJ5' dated the same day to His Royal Highness, requesting for a dissolution of the Legislative Assembly.

[109] This letter represents a simple request without more, for the dissolution of the Legislative Assembly. There was no indication as to why such dissolution was requested. There was no indication either, under which article the request was made. The absence of a specific article being expressed in this letter, became Nizar's trump card.

[110] Although there was no indication from the equally eminent lead counsel for Zambry, Dato' Cecil Abraham, as to the sequence of events on 4 February 2009, I believe it would not be wrong for me to take judicial notice that Nizar would have had access to the newspapers on the morning of 4 February 2009. He would have then been appraised of the Election Commission's ruling on the non-vacancy of the State seats of Behrang and Changkat Jering in the morning. Thus it is reasonable to presume that Nizar's 'request' letter of MNJ5 was dispatched to His Royal Highness soon after, ie, in the earlier part of the day on 4 February 2009.

[111] It was in evidence, as affirmed on 8 April 2009, in the affidavit of the Private Secretary to His Royal Highness, Dato' Kol. Abd Rahim b. Mohamad Nor, that on 4 February 2009 at about 12 noon, he received a missed call from Nizar. He returned the call. Nizar requested for an audience with His Royal Highness on an urgent basis. The Private Secretary informed Nizar that His Royal Highness has agreed to an audience on the same day at 5pm.

[112] On the very day itself ie, 4 February 2009, the Private Secretary affirmed that at about 3pm, His Royal Highness received the letters from the Three ADUNs which contained manifestations of their loss of confidence in Nizar; that they no longer support him as the Menteri Besar of Perak; that although they have resigned from their respective political parties, they remain as independent State Legislative Assemblymen/woman for their respective constituencies and that they support the Barisan Nasional.

[113] It was also affirmed by the Private Secretary that at about the same time, he received a letter addressed to His Royal Highness dated 3 February 2009 signed by 27 members of the Legislative Assembly stating *inter alia*, that they have lost confidence in Nizar as the Menteri Besar of Perak and that the Barisan Nasional and its supporters now has the command of a majority of the members of the Legislative Assembly.

[114] According to the Private Secretary, Nizar then telephoned him the same afternoon at 3.20pm (on 4 February 2009) and requested for the audience with His Royal Highness to be brought forward from 5pm to a time earlier than 5pm before the

A Deputy Prime Minister makes any live telecast announcement. According to the Private Secretary, before he could revert to Nizar, the latter arrived at Istana Kinta, barely thirty minutes later.

[115] It was in evidence that the State Legal Advisor was
B requested by His Royal Highness to be present at this audience. The audience Nizar had with His Royal Highness took place at 5.30pm in the presence of the State Legal Advisor.

[116] The evidence of the State Legal Advisor as to what
C transpired in the audience between His Royal Highness, Nizar and himself was much disputed by Nizar. Thus, in the light of conflicts in the affidavit evidence, both parties agreed to be cross-examined on their affidavits. Only then were we able to discern the facts, as it were.

D **[117]** According to the State Legal Advisor, His Royal Highness informed Nizar that he would need time to consider his request. Nizar then handed a copy of a draft Proclamation to the State Legal Advisor, to be signed by His Royal Highness should His Royal Highness grant his consent to the request for dissolution.
E This draft Proclamation came in for some serious dispute. Nizar relied on this draft Proclamation to stress that his request for dissolution was made pursuant to art. XXXVI(2) of the Perak State Constitution as clearly manifested he said, in the body of the said draft Proclamation. For purposes of general knowledge,
F this draft Proclamation is a standard document available in the office of the Menteri Besar.

[118] For now, I would like to direct focus on the following issue. On 4 February 2009, what prompted Nizar to write the
G letter (exh. MNJ5) to His Royal Highness requesting for the dissolution of Legislative Assembly? Is it open for him to say that at the time of writing MNJ5, he was unaware, unconscious and uninformed and therefore oblivious to the damning letters sent by the three ADUNs to the Speaker and leaders of the Pakatan
H Alliance?

[119] Consider this. The fact of withdrawal of their resignation letters was made known on 1 February 2009 and 3 February 2009 respectively to the Speaker. The fact of their having left their
I respective political parties (PKR and DAP) were also made known by letters to the Speaker, the President of PKR and the Secretary

to the DAP on the same day. Remember that it is Nizar's contention that, all he knew was that the three ADUNs had resigned. He denied having known of the withdrawal of their resignation. Even assuming this highly unlikely situation can be accepted for a moment, what about the larger than life announcement made by the Election Commission on the morning of 4 February 2009?

[120] Is it Nizar's contention that since the Election Commission announced the non vacancy of only two seats on 4 February 2009 then it does not mean that he had lost the majority confidence, since he still had 29 seats? But in my view if such was Nizar's contention, it would still be untenable since the Speaker would have known on the previous day ie, on 3 February 2009 that Madam Hee Yit Foong Assemblywoman from Jelapang had already withdrawn her resignation. Thus when Nizar wrote 4 February 2009 letter MNJ5 he would have known of having lost his majority. Hence the 'request' letter.

[121] Or is Nizar deliberately ignoring this fact and let on that regardless of the withdrawal letters, since the Speaker himself had determined that the three ADUNs had resigned and had therefore vacated their seats in the Legislative Assembly, that is then the end of the matter? In this, Nizar's contention is that the Speaker's decision on this issue prevails.

[122] In the light of the clear powers of the Election Commission under art. XXXVI(5), it is my view that Nizar's posture above cannot be sustained.

[123] On 5 February 2009, Nizar once again wrote to His Royal Highness a letter dated the same day, informing His Royal Highness of the latest political development in the State and once again requested His Royal Highness to dissolve the Legislative Assembly.

[124] On the following morning at about 10am, the then Deputy Prime Minister in his capacity as Chairman of the Perak Barisan Nasional had an audience with His Royal Highness. He presented His Royal Highness with a letter of support from 27 members of the Perak State aligned to Barisan Nasional and the support given by the three ADUNs as well. The letter manifested the

A signatories' willingness to support any candidate nominated by the then Deputy Prime Minister as the next candidate for the post of Menteri Besar of Perak. Another Assemblyman from Bota, one Nasarudin also joined support for the Barisan Nasional.

B **[125]** At about 11.15am, all 31 members were brought before His Royal Highness where all 31 members (which include the Three ADUNs and one Bota Assemblyman) pledged support for Barisan Nasional. The three ADUNs were separately interviewed by His Royal Highness. The three ADUNs and the Bota Assemblyman
C signed letters pledging their support for Barisan Nasional and expressed that it was made voluntarily and without any coercion from any party.

[126] On 5 February 2009, His Royal Highness requested Nizar's
D presence at the Istana Kinta at 1pm. Nizar was informed that his request for dissolution of the Legislative Assembly was refused; that His Royal Highness had exercised his judgment and Royal Prerogative to so refuse his said request, in accordance with art. XVI(6) of the Perak State Constitution.

E **[127]** The outcome of this subsequently became the basis of Nizar's claim in this appeal. He refused to resign and sought declaration that he is the rightful Menteri Besar.

[128] It is in the light of all these events that we are now invited
F to consider the critical question as to under which provision of the Perak State Constitution was the request for dissolution by Nizar made to His Royal Highness.

[129] Going in reverse order, the fact of the resignation letters
G and subsequent withdrawals thereof by the two Assemblymen were made known to the Speaker on 1 February 2009 and on 3 February 2009 in respect of the Jelapang Assemblywoman. The fact of their having left their respective political parties were also disclosed to the respective leaders of their political parties on
H 3 February 2009.

[130] It is certainly implausible for Nizar to say that as at 4 February 2009, he was unaware of the fact that he is left without the 'support' of the Assemblymen and one Assemblywoman.

I

[131] Nizar's argument militates against the plain evidence staring him in the face. For one, we are supposed to believe that the Speaker and the key personalities in the respective political parties (DAP and PKR) known to be astute, however chose to withhold this vital information from Nizar.

[132] If indeed they had so withheld the said information, was there any particular reason why Nizar is to be insulated from the stark reality of the party's increasingly fragile political position?

[133] Surely it could not be Nizar's stand that the key personalities in his party were not privy to the facts, and are therefore unable to advise him of the political morass they now seemed to have sunk into?

[134] In fact, Nizar's disclaimer to any knowledge as to the true situation as regards the position taken by the three ADUNs, which had been conveyed to the Speaker and the key personalities in the political parties, cast aspersions on the integrity and professionalism of these personalities. This is not to mention of course, that an unenlightened Menteri Besar would surely not go down well with his public.

[135] It is Nizar's contention that what impelled him to write his letter of MNJ5 and seeking audience with His Royal Highness to request for dissolution on 4 February 2009 was to inform His Royal Highness of the resignations of the three ADUNs since their seats had fallen vacant. Clearly on the facts, Nizar has no legal basis to assert that the three ADUNS had resigned their seats. He was emphatic in his stand that in his audience with His Royal Highness on 4 February 2009, he had not stated, informed nor proposed to His Royal Highness that he had lost the majority confidence of the members in the Legislative Assembly. Thus he said, his request for dissolution was clearly made pursuant to art. XXXVI(2) and not pursuant to art. XVI(6).

[136] The audience Nizar had with His Royal Highness on 4 February 2009 at 5.30pm in the presence of the State Legal Advisor is pivotal to the subsequent turn of events.

[137] It can safely be inferred that Nizar himself is an intelligent man. In fact I believe he is. He would be alert if not alerted, to the political dynamics existing then in the State of Perak. The

information on the political situation would, without question be notified to him. His vigilance is displayed when he himself alerted His Royal Highness on the uneasy political events taking place in Perak as early as 2 February 2009. He would have made a quick mental assessment of the effect of the depletion in the number of Assemblyman aligned to him in the Legislative Assembly. Why else then would Nizar sent a letter requesting for dissolution of the Legislative Assembly on 4 February 2009 to His Royal Highness? Was it merely for the purpose of informing His Royal Highness of the vacancy of the three seats resulting in a deadlock? This is because he had said that a 'deadlock' is by no means a loss of majority. In that context, it is not easy for this court to unquestioningly accept Nizar's answer given during his cross-examination.

[138] With the rapid turn of events in the political landscape of Perak then, and without missing a beat, Nizar wrote a second 'request' letter dated 5 February 2009 to His Royal Highness. A similar request made within the next twenty four hours? Does not this indicate Nizar's state of mind?

[139] If he can shrug off the allegation of having lost majority confidence in the first request, what then is his reason for requesting a dissolution of the Legislative Assembly for the second time? Putting it in another way, if he maintains that he still enjoys the majority confidence of members of the Legislative Assembly, what compelled him then to request for a dissolution?

[140] First things first. Article XXXVI(2) is a general power to prorogue or dissolve the Legislative Assembly. The provision does not indicate when the request can be made or the reasons to be given for such request. It is exercised at His Royal Highness' discretion.

[141] As captured aptly by the learned judge, "… the letter is a general request to His Royal Highness to exercise His Royal Highness' **Royal Prerogative** to dissolve the State Legislative Assembly in the light of the recent development in the political scene of Perak as deposed to by Nizar." (emphasis added).

[142] It is generally accepted that the Menteri Besar may choose the time for a general election within the five year life span of the Legislative Assembly at any time.

[143] As could happen, when the Menteri Besar enjoys a healthy majority after a period of time at the helm of government he can seek dissolution of the Legislative Assembly to hold a snap election, merely to affirm his political strength. Or he can request for dissolution under art. XXXVI(2) when his term is nearing the five year limitation which in any event would be dissolved by operation of law. For whichever reason it may be, a request for dissolution of the Legislative Assembly under art. XXXVI(2) if granted by His Royal Highness, would result in a fresh election pursuant to art. XXXVI(4). Thus a request made for dissolution of the Legislative Assembly under art. XXXVI(2) usually bears no dire consequences for the Menteri Besar.

[144] The position is diametrically different if the request for dissolution of the Legislative Assembly is made under art. XVI(6) AND the consent of His Royal Highness is withheld. The Menteri Besar shall then have no option but to tender the resignation of the Executive Council.

[145] Thus the importance of determining this issue. The dynamics may of course be different if there is a dissension within the party. The Menteri Besar can then utilise the power of dissolution to protect his own interests against attempts within the party to dislodge him. Although the ruler has a discretion to withhold consent to the Menteri Besar's request for dissolution, the ruler normally accepts the Menteri Besar's advice and grants a dissolution when it is requested.

[146] Thus the question is – in exercising his discretion to withhold consent on a request for dissolution what would be the circumstances in which the ruler would withhold his consent?

[147] It is clear that one of the factors influencing the ruler's discretion to withhold consent is when the Chief Minister has lost the confidence of the majority in the Legislative Assembly and not otherwise. (See *Halsbury's Laws of Malaysia,* vol 2 p 25).

[148] Convention has it that normally the ruler accepts the advice of the Prime Minister and grants a dissolution when requested, unless there are reasons to refuse such request, such as when that advice was improperly given. Whilst the Prime Minister may request a dissolution at any time, the question whether the ruler would accede to such request is a matter entirely within His Majesty's personal discretion, as acceded to by the learned judge.

[149] Taken at its face value and as far as the circumstances indicate, there seems to be no reason (compelling or otherwise) for Nizar to make that request even if under art. XXXVI(2). Even if he can act alone in making the request, he must know that the consequence of this request (whether granted or withheld) would have an impact on his government. Thus it is highly unlikely that Nizar did not consult some, if not all of his colleagues in the party before requesting the dissolution. Or rather, is it because his party colleagues had conferred with him regarding the political tumult they are in, that Nizar was compelled to request for the dissolution of the Legislative Assembly?

[150] As had been suggested by one writer, Brian Thompson in his book *'Constitutional & Administrative Law'* (3rd edn) at p 114 that:

> ... it is unlikely that in making such request, the Prime Minister (in our case, the Menteri Besar), would not consult some colleagues. In addition a wide range of information must be considered in taking the decision to call for a general election. The Prime Minister (the Menteri Besar in our case) will want to know about the party's preparedness to wage an election campaign, and careful interpretation of the opinion polls will be required.

[151] I agree with the said writer. It is very likely that Nizar consulted his own party members, since the decision to request for dissolution is a political decision. A reasonable inference is that it is only when Nizar is completely informed of the true political position that Nizar realized the urgency of making a request for dissolution.

[152] A look at the relevant provisions in the Perak State Constitution pertaining to requests for dissolution of the Legislative Assembly is pertinent. They are art. XXXVI(2) and art. XVI(6). Article XXXVI(2) states that:

> (2) His Royal Highness may prorogue or dissolve the Legislative Assembly.

[153] The other provision is the one that lies at the very heart of this appeal, ie, art. XVI(6). It reads:

(6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly then, unless at his request His Royal dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

[154] A related provision is art. XVIII(2)(b) where His Royal Highness acts in his absolute discretion in the withholding of consent to a request for the dissolution of the Legislative Assembly.

[155] As at 4 February 2009, it is reasonable to infer that Nizar was completely appraised of the political imbalance. Pakatan had 28 seats now from its former numerical 'superiority' of 31 seats.

[156] Thus whether or not the three ADUNs support the Barisan Nasional, the fact remains that Nizar no longer enjoy a majority position when Pakatan lost the three seats in the Legislative Assembly at the time when his letter of 4 February 2009 (MNJ5) and subsequent audience at 5.30pm on the same day and the same position obtaining on 5 February 2009 when he wrote his second 'request' letter. It should now become apparent to Nizar that all of a sudden, three is not a crowd.

[157] Nizar contended that he has not lost his majority because there was merely a 'deadlock'. As Roget's Thesaurus indicates, a 'deadlock' means that both sides are even; that there is a stalemate; that both are 'neck to neck and if legalese be required, both sides rank *pari passu*, each with the other etc: Unless of course, 'deadlock' is a new principle of democracy. As I remember it, democracy goes by the principle of 'majority wins'. So there you have it. However subsequent events seem to fly in the face of this contention.

[158] My view is strengthened by the position taken by Nizar himself the next day. On 5 February 2009 as alluded to earlier, without waiting for His Royal Highness' reply to his request, Nizar sent to His Royal Highness posthaste, another letter (dated 5 February 2009 ie, exh. MNJ6) requesting for the dissolution of the Legislative Assembly. However, in this letter, Nizar made reference to art. XVI(6) by quoting the entire article.

[159] The inclusion of art. XVI(6) in this letter including his brief view, is certainly intriguing. This can only mean and it is a reasonable inference to make, that that particular provision ie, art. VI(6) was spoken of or mentioned previous to this letter being written. From the materials before me it appears to have been so mentioned on the evening of 4 February 2009 when Nizar had an audience with His Royal Highness at 5.30pm in the presence of the State Legal Advisor.

[160] This fact ties in with what was deposed to by the State Legal Advisor in his affidavit affirmed on 8 April 2009.

[161] At para 7(a) at p. 109 the State Legal Advisor affirmed that:

> The Applicant (Nizar) was requesting that the Legislative Assembly be dissolved pursuant to Article XVI(6) of the Undang-Undang Tubuh Kerajaan Negeri Perak (The Perak State Constitution) and proceeded to hand over a proclamation to be executed by DYMM Sultan of Perak assenting to the dissolution of the Legislative Assembly.

[162] The part of the above statement alleged by the State Legal Advisor to have been made by Nizar was said to have been made on the previous evening, ie, on 4 February 2009 during Nizar's audience with His Royal Highness in his presence at 5.30pm at Istana Kinta.

[163] In my view the above deposition is consistent with what was expressed in Nizar's letter of 5 February 2009 where art. XVI(6) was mentioned. For otherwise the sudden reference to art. XVI(6) in 5 February 2009 letter, would be viewed by anyone present in the meeting of 4 February 2009, to have come out of nowhere, like a bolt from the blue.

[164] In this regard, I find that the learned judge's finding that the evidence given by the State Legal Advisor should be taken with a 'pinch of salt' and that he preferred the evidence given by Nizar, to be against the weight of evidence apparent in this appeal. The learned judge had clearly failed to appreciate the facts and circumstances in this appeal and his findings of fact are clearly wrong.

[165] In this connection this evidence given by the State Legal Advisor is crucial. It is a relevant fact since in my view it was not credibly challenged and in the context of this appeal, I find that the above deposition is to be accepted and admitted. In this, I would rely on s. 8 Evidence Act 1950 which reads:

> 8 (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) the conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto.

[166] In view of the above, it is my view that Nizar's denial that his request for dissolution was made under art. XVI(6) stands on flimsy ground. In short, Nizar was unable to credibly dispute that he has not lost the support or confidence of a majority of members of the Legislative Assembly at the time he requested for dissolution of the Legislative Assembly. The sum of all these parts is that Nizar was well aware of his fragile political position.

[167] In this connection, with respect, my view is that the learned judge had not properly appreciated the facts and circumstances and came to a wrong finding of fact and law. He had clearly misdirected himself when he concluded that in the absence of reference to any specific provision of the Perak State Constitution by Nizar in his letters of MNJ5 and MNJ6 to His Royal Highness in requesting His Royal Highness' consent for the dissolution of the Legislative Assembly, it would be reasonable to think that Nizar was appealing to His Royal Highness to exercise His Royal Highness' Royal Prerogative under art. XXXVI(2) of the Perak State Constitution to overcome the 'deadlock' of having no clear majority by either Pakatan or Barisan Nasional.

[168] In addition, my view is that the presentation of (a) the draft Proclamation which Nizar himself admitted was not referred to and therefore not vetted by the State Legal Advisor; (b) the letters of 4 February 2009 and 5 February 2009 (exh. MNJ5 and MNJ6); (c) the media statement issued by the Palace on 6 February 2009, collectively constitute uncontroverted

documentary evidence pointing to the inevitable fact that the request by Nizar for the dissolution of the Legislative Assembly was made under art. XVI(6) of the Perak State Constitution. In view of his clear loss of confidence of a majority of members of the Legislative Assembly, any attempt by Nizar to request for a dissolution of the Legislative Assembly points strongly to the inference that it was made under art. XVI(6).

[169] At the end of it, it is my belief that from the surrounding facts and overwhelming circumstances as stated above, it is established that Nizar's request made to His Royal Highness for the dissolution of the Legislative Assembly was undoubtedly made under art. XVI(6) and not under art. XXXVI(2). From the established facts, this is clearly an irresistible inference.

[170] The next question of whether or not the resignation of the Executive Council would include Nizar himself, is moot. In fact it is the very pulse of the instant appeal and a raging debate on this point still palpitates the pages of many legal literature. However before discussing this issue, an issue closely related to the first, would have to be determined.

Related Issue

Whether His Royal Highness Is Entitled To Interview Various Members Of The Legislative Assembly On 5 February 2009 To Ascertain Who Commands The Majority In The Legislative Assembly

[171] Quite one of the intensely debated issues in the instant appeal (at least in the public domain), relates to the question of whether His Royal Highness is entitled to interview various members of the Legislative Assembly on 5 February 2009 to ascertain who commands the majority therein.

[172] Counsel for Nizar, Tn. Hj. Sulaiman was vigorous in his assertion that the provision of art. XVI(6) can only be triggered if it could factually be proven that the Menteri Besar has ceased to command the confidence of the Legislative Assembly. He said that this has to be established as a fact. This issue is interwoven with the question of the applicable test in the exercise of His Royal Highness' judgment in art. XVI(6). It is Tn. Hj. Sulaiman's submission that the exercise of the personal judgment of His Royal Highness is excluded in the operation of art. XVI(6). In other

words, Tn. Hj. Sulaiman contends that His Royal Highness is not vested with the power to make his own subjective judgment on this issue under this article.

[173] The learned judge agreed with Tn. Hj. Sulaiman's view and held that the subjective element operates only with regard to His Royal Highness' power under art. XVI(2) where His Royal Highness exercises His Majesty's own judgment as "to who in his judgment is likely to command the confidence of the majority". (This relates to the appointment of the Menteri Besar).

[174] Thus from my understanding of Tn. Hj. Sulaiman's assertion, in the absence of these subjective elements in art. XVI(6), an objective test is called for in the operation of art. XVI(6).

[175] In this regard, the learned judge found fault with the enquiries conducted by His Royal Highness. He found that His Majesty's finding need not necessarily result in His Majesty being entitled to form an opinion that Nizar had ceased to command the confidence of the majority of the members of the Legislative Assembly.

[176] This is what the learned judge said:

> ... In another word, one cannot say that because His Royal Highness has judged that the respondent is likely to command the confidence of the majority in the Legislative Assembly therefore the applicant ceases to command the confidence of the majority of members the Legislative Assembly. I would say that the personal opinion or judgment of His Royal Highness is irrelevant to the construction of art. XV(6).

[177] A blithe pronouncement such as the above, does nothing to mitigate my belief that the learned judge's understanding and construction of the facts and the law in this appeal is erroneous.

[178] I had said at the start that a fine-tuning of our understanding of the various dynamics inherent in our Constitution is a pre-requisite.

[179] In this context, it is easy enough to say that His Royal Highness was entitled to exercise his Royal Prerogatives in conducting the said interview and enquiry of the other members

of the Legislative Assembly. But it would not render such act of His Royal Highness any more legitimate in the eyes of the uninitiated.

[180] They are very likely to observe that this unknown entity called the 'Royal Prerogative' is a convenient mode to legitimize an otherwise unconstitutional act.

[181] Therefore the importance of a brief outline on the issue of Royal Prerogatives, including discretionary and residual powers would be helpful.

[182] I believe that most lawyers dealing with matters relating to prerogatives would gravitate towards its meaning from the English position. Intertwined as it is with conventions, they can see that most conventions are derived from English constitutional practice, some of which are incorporated in the Federal Constitution itself. Examples are those conventions connected to the dissolution of Parliament or State Legislative Assembly and appointment of the Prime Minister. These discretionary and prerogative powers are enjoyed exclusively by the Yang di-Pertuan Agong and the Rulers, respectively.

[183] Thus, it might be instructive to make a quick run past the English Prerogative history, in order to understand ours. I will for this purpose, disregard the period before, but would start with the abolition of the Court of Star Chamber in England then.

[184] Soon after its abolition, the Privy Council was established. Over the years the powers of the Privy Council gave legal form to certain decisions of the government, whilst the Cabinet exercised its policy-making functions of the executive.

[185] The Monarch in all of these as Head of State and the government, is personified for Crown purposes. For both the Monarch and government to govern, powers are needed to able them to perform their constitutional functions. In any case, the rule of law requires that these powers are grounded in law and not outside of the system.

[186] However the power of the Monarch and the Crown must either be derived from Acts of Parliament or they must be recognised as a matter of common law. Thus in the 17th century, constitutional settlements and the powers of the Crown, were

subject to laws and that there were no powers of the Crown which could not be taken away or controlled by statute. Once that is achieved, the courts then accepted that the Monarch and the Crown enjoyed certain powers, rights, immunities and privileges which were necessary for the maintenance of government. These powers were not shared with private citizens. The terms prerogatives was used as a collective description of these matters. As Blackstone defined it:

> … The medieval King was both Head of the Kingdom and feudal Lord. He had powers accounted for by the need to preserve the realm against external enemies and an **undefined residual power which he might use for the public good** … . (emphasis added)

[187] As we shall see later, Blackstone's definition holds true too in this country.

[188] Back in England again, the common lawyers informed the Stuart Kings that there were two types of prerogatives. Ordinary and Absolute prerogative.

[189] The Ordinary prerogatives meant that royal functions could only be exercised in defined ways for a specific purpose. In this context, the King dispenses some of his administrative powers through the Ministers; his judicial functions through his judges.

[190] The absolute prerogative powers are those which the King exercises in his discretion. They include powers of pardon, of giving honours, property and rights, franchise and treasure troves, of acts of state and a host of others, both internal and external matters. Of these the most important prerogative power is I believe, in relation to the Ruler's prerogative in the exercise of his executive authority.

[191] If the English prerogative powers seem undefined, the position in this country appears to be the same. Before our Independence, the Crown Territories of Penang and Malacca received the English prerogatives at common law, which ceased upon Independence. However the executive and discretionary powers conferred on the Governors of Penang, Malacca, Sabah and Sarawak are defined by their respective Constitutions.

[192] The nine rulers in the Malay States are indigenous Rulers and enjoyed their own prerogatives all along. Inasmuch as extra-constitutional prerogatives if any were carefully considered by the framers of our Constitution, being mindful of the maintenance of the separation of powers, it nevertheless allowed more than a modicum of prerogative and discretionary powers to the rulers. It would be said that the tone of the negotiations and agreements prior to Independence was based largely on maintaining the balance of differing interests, yet compromising to a large extent to protect and preserve the indigenous rights of the Malay Rulers. An understanding of these fundamentals must be carefully read and understood.

[193] Thus the traditional prerogatives of the rulers remain and are buttressed by the Constitution of the respective States. In fact upon independence, our Constitution as drafted under the Chairmanship of Lord Reid, preserved and indeed enhanced the monarchy in Malaysia in several ways as seen in its provisions.

[194] However, over the years, even with the guarantee of protection as provided for in art. 71, and the preservation of these rights in art. 181, some of these prerogative rights have been whittled away by amendments to the Federal Constitution.

[195] As constitutional monarchs, the powers of the Yang di-Pertuan Agong and the State Rulers are defined in the respective Constitutions. Generally, the duty of the Yang di-Pertuan Agong is to act upon Ministerial advice. His powers are more circumscribed. The State Ruler's position is much the same, though it appears that they have more latitude in their respective States. Although in some, limitations are placed by way of conventions.

[196] What is rarely displayed however, is the fact that the Yang di-Pertuan Agong and Rulers are seised with prerogative privileges and residual rights and powers. Some of which are expressed, others implied.

[197] In this regard, His Royal Highness' Royal Prerogatives are drawn up in art. LXVII and art. X of the Perak State Constitution. Article X reads:

X. In amplification and not in derogation of the royal prerogatives hitherto possessed or exercised by the Sovereign the following royal prerogatives **among others** are vested in the Sovereign:

(a) the Fountain of Honour;

(b) the Fountain of Justice;

(c) the Fountain of Mercy;

(d) the Head of the Religion of the State;

(e) the Protector of Malay Custom;

(f) the Ultimate Owner of the Soil.

[198] As can be seen, the above prerogatives are not exhaustive. Thus what Maitland wrote in 1888 that there was 'often great uncertainty as to the exact limits of the prerogative' is still true today.

[199] The State Constitutions of the rest of the other eight States of Johor, Negeri Sembilan, Selangor, Perlis, Kelantan, Pahang, Terengganu and Kedah ruled by their respective Rulers, bear the exact same provision as found in art. X of the Perak State Constitution.

[200] It is then a matter of having an understanding of these metaphysics and how they operate. Unobtrusive as they may seem they are in fact omnipresent and their exercise may have far-reaching effect on the governance of the State.

[201] It must be stressed that the Royal Prerogative, discretionary and residual powers do not repose in the royal personages in vain. It is best expressed by Viscount Radcliffe in *Burmah Oil Co Ltd v. Lord Advocate* [1965] AC 75 p. 113 where His Lordship observed:

> ... The essence of a prerogative power if one follows Locke's thought, is not merely to administer the existing law – there is no need for any prerogative to execute the law – **but to act for the public good** where there is no law, or even to dispense with or override the law **where the ultimate preservation of society is in question.** (emphasis added)

[202] And similarly in the Malaysian context, it was observed by Lee Hun Hoe CJ (Borneo) in *Government of Malaysia v. Mahan Singh* [1975] 2 MLJ 155 that:

A … The King is the first person in the nation – being superior to both Houses in dignity and the only branch of the Legislative that has a separate existence and is capable of performing any act at a time when Parliament is not in being.

B **[203]** Following from that, it has to be said that, it is not at any time or any situation that this discretionary or prerogative power can be invoked. The general acceptance is that it has to be exercised judiciously.

C **[204]** It is clear that the Crown has a right and duty to protect its realm and citizens in times of war and peace and can invoke its prerogative to that end. That should never be in question.

[205] Back to the situation in Perak, the sequence of events must again be stated in clear terms. Firstly, it is not correct for the
D learned judge to observe that because His Royal Highness had judged that Zambry is likely to command the confidence of the majority members of the Legislative Assembly, therefore His Royal Highness then decides that Nizar had ceased to command the confidence of a majority of members of the Assembly. With
E respect, a convoluted approach as manifested, is not in order.

[206] The learned judge went on to say that the personal judgment of His Royal Highness is irrelevant to the construction of art. XVI(6).

F **[207]** Clearly the proper construction to be given to art. XVI(6) underlaid as it is, with the inherent discretionary and prerogative powers of His Royal Highness, I am afraid, was lost on the learned judge.

G **[208]** It bears testimony that on 4 February 2009 at 3.30pm, His Royal Highness received identical letters from the three ADUNs dated 3 February 2009. These letters stated that:

(a) the three ADUNs have withdrawn their purported resignation;

H (b) they have left their respective political parties;

(c) they are still members of the Legislative Assembly;

(d) their seats have been declared not vacant by Election Commission;

I

(e) they have expressed their loss of confidence in Nizar; and

(f) they support Barisan Nasional;

[209] In view of the facts and circumstances stated above, at the time when dissolution was requested by Nizar, His Royal Highness was cognisant of the existing political equilibrium. If it was not obvious to Nizar, it was patently obvious to His Royal Highness that Nizar had by then lost his majority. His Royal Highness need not determine Nizar's loss of majority in a circuitous way, by first enquiring whether the other members of the Legislative Assembly (31 of them) who now form the majority support Zambry, **and only then took cognisance of Nizar's loss of confidence as was suggested** by the learned judge. (emphasis added)

[210] The enquiry by His Royal Highness of the other members of the Assembly could well be this. It is not in evidence as to His Royal Highness' reason as to why he conducted the enquiry. It is likely that the enquiry was conducted merely to confirm certain facts. It is reasonable to infer too, that since His Royal Highness knew of Nizar's loss of majority as early as 4 February 2009 or even on 3 February 2009 His Royal Highness might have in mind to withhold his consent pursuant to art. XVI(6). If that was the case, is His Royal Highness precluded from exercising his prerogative in the manner he did?

[211] Once again, what could be the cause of His Royal Highness' enquiry? Firstly it is probably to confirm what he already knew of Nizar's loss of majority; secondly, to confirm who is likely to command the confidence of the majority of members of the Legislative Assembly before appointing the next Menteri Besar. In any case, in both situations above, His Royal Highness was exercising his absolute discretion – the first under art. XVI(6) and the second under art. XVI(2). His Royal Highness' act in exercising both would involve the exercise of his prerogative powers.

[212] In this, even if His Royal Highness is precluded from employing his subjective state of mind for the operation of art. XVI(6) in determining the fact that Nizar had ceased to command the confidence of the Assembly, the establishment of this fact could be and was done objectively by His Royal Highness.

[213] Objectively it was ascertained in His Royal Highness' enquiry and interview of the other members of the Legislative Assembly including the three ADUNs, that Nizar had 28 seats, as opposed to Barisan Nasional's 31. If mathematical calculation

A alone is **acceptable** in determining the loss of majority (without having to go to the floor for an adverse vote) as indicated in *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v. Tun Mohd Said bin Keruak & Ors* [1995] 1 CLJ 184 and *Adegbenro v. Akintola* [1963] 2 WLR 63, then this factual denominator would be
B consistent with the objective assessment as specified by Nizar. (emphasis added).

[214] However, before that issue is taken, we must not lose sight of this relevant question once again. What could be the real
C purpose of His Royal Highness' enquiry conducted on 5 February 2009?

[215] Consider this position. His Royal Highness received not one but two letters of request for the dissolution of the Legislative Assembly from Nizar.
D

[216] The decision whether to grant or withhold his consent upon such request being made is an act of His Royal Highness' discretion. In this, unlike the clear provision of art. XVIII 2(a), His Royal Highness does not act on advice if His Royal Highness
E were to exercise his power under art. XVIII 2(b) ie, whether to withhold consent on a request for the dissolution of the Legislative Assembly. However, without the benefit of advice of the Executive Council or a member thereof, His Royal Highness has therefore, to ascertain the facts himself prior to giving a decision on Nizar's
F request.

[217] In this regard it might have been imprudent for His Royal Highness to make a decision without regard to the actual facts. For instance, if His Royal Highness were to find that the contents
G of the three letters from the three ADUNs were insufficient in ascertaining Nizar's loss of majority, he can, in the exercise of his prerogative and discretion, seek clarification of the facts contained in the letters from the three ADUNs.

H **[218]** Therefore His Royal Highness had to assess the political position correctly. He would have to give a value judgment in respect of Nizar's request for dissolution. In that regard, it is completely within His Royal Highness' discretion and within the contemplation of the relevant Articles in the Perak State
I Constitution for His Royal Highness to make enquiries. In deciding whether or not to grant or withhold a request for dissolution,

perhaps His Royal Highness might have to look into such factors as were suggested by A.W. Bradley and K.D. Ewing in their book *'Constitutional and Administrative Law'* (13th edn). These are:

(i) If a general election would be detrimental to the national economy;

(ii) if the monarch can rely on finding another member of the Parliament who could carry on his government for a reasonable period with a working majority;

(iii) if the existing Parliament is still vital, viable and capable of doing its job.

The authors indicated that the above factors are by no means exhaustive.

[219] In *'Constitutional and Administrative Law'* S.A. de Smith subscribed to the above view. At p. 105, the author expressed *inter alia*, that:

> … The Queen may properly refuse a Prime Minister's request for a dissolution if she has substantial ground for believing that:
>
> (i) That an alternative Government enjoying the confidence of a majority of the House of Commons can be formed without a General Election and
>
> (ii) that a General Election held at that time would be contrary to the national interest.

[220] Prof de Smith went on to say very interestingly that:

> Refusal might be still more readily justifiable if the rebels were known to be prepared to form a coalition government with an opposition party.
>
> …
>
> A *fortiori*, a Prime Minister who has actually been repudiated by his own parliamentary party in favour of one of his colleagues can claim no constitutional right at all to demand a dissolution. It is also possible to imagine a situation in which the fact that a General Election had been held only a short while previously might tip the balance against granting a request for a dissolution.

[221] The above passage fits in squarely with the Perak situation. His Royal Highness' enquiry is nothing more than His Royal Highness' exercise of his prerogative power, inasmuch the same way that that prerogative power could be exercised by the monarch in England.

[222] In so doing, perhaps His Royal Highness acted in an abundance of caution to confirm what the actual facts were. His Royal Highness was circumspect and discerning as can only be expected. In conducting the said enquiry, the actual facts could easily be determined objectively by His Royal Highness. The element of subjectivity in His Royal Highness' decision then does not arise.

[223] Thus with respect, the finding of the learned judge that His Royal Highness was not entitled to interview the various members of the Legislative Assembly on 5 February 2009 in ascertaining who commands the majority in the Legislative Assembly was plainly wrong. The learned judge's erroneous finding indicates a misconception of why and how the dynamics of both law, prerogative and discretionary powers operate in this constitutional context. The learned judge had clearly misdirected himself in this regard.

[224] At this point, one has to stop and ponder awhile. Taking the cue from what the learned judge had said in his judgment that His Royal Highness is **not entitled** to interview the other members of the Legislative Assembly what could the judge possibly mean, **after admitting** that he was under no doubt that His Royal Highness has absolute discretion with regard to the appointment of a Menteri Besar and to withhold consent to a request for the dissolution of the State Assembly? (emphasis added).

[225] By the word "not entitled", a situation of having no right, no authority and no mandate is quickly envisaged. This indictment would be countermanded by the clear provision of arts. X, XVI(2) and XVIII(2)(b) of the Perak State Constitution. Moreover in art. X, His Royal Highness is vested with the executive authority in the State of Perak. In much the same way as the Yang di-Pertuan Agong in art. 39 of the Federal Constitution. This executive power is accompanied by various discretionary powers.

[226] One of the most critical executive powers of the ruler is his constitutional duty to maintain peace and order for the public good. What exactly does this entail? A

[227] In the absence of any definition, perhaps that of Wade and Philips found in *'Constitutional and Administrator Law'* p. 43 may be of use. The author's opinion is that: B

> … Broadly speaking the executive function involves the continuing maintenance of a state's government. It emphasizes the whole corpus of authority to govern, other than that which is involved in the legislative functions of Parliament and the judicial functions of the courts. The general direction of policy includes the initiation of legislation, **the maintenance of order,** the promotion of social and economic welfare … The executive function has therefore a **residual** character and is exercised by techniques ranging from the formation of broad policy to the detailed management of routine services. C D

[228] Generally, the situation obtaining in the passage above may also obtain in Malaysia.

[229] As extensive as the executive and discretionary powers are, as reposed in the rulers, the ruler's wisdom is always called upon in the exercise of those powers. E

[230] In any given situation it is usual for the ruler making any decision, to make a reasoned assessment of the situation as found in his State. The exercise of those powers in normal or abnormal situation would have a different bearing. An oft-quoted passage says that: F

> … under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong (including the Ruler of State) would not withhold his consent to a request for dissolution of Parliament (or State Assembly). His role under such a situation is purely formal. G

[231] The situation in Perak at the relevant time could be viewed as being bereft of normalcy. Not unless one views as normal, the political tension, intense political pressure, suspense and shifting political loyalties and betrayals, as being routine and all in a day's work. H

I

[232] In this, the maturity and wisdom of the ruler is incumbent. Thus, when His Royal Highness exercised his prerogative and discretionary powers in conducting 5 February 2009 enquiry, it was obviously to contain a situation which had potential threat and danger to the existing calm and dignity of the State. A decision had to be made as soon as possible as to which route the State has to take, for its continued governance. In this, His Royal Highness' consciousness of the significance of the exercise of his prerogative powers and its limitations cannot be understated.

[233] As eloquently suggested by *Halsbury's Law of Malaysia* (vol 2 p. 46):

> ... In reality, the discretionary powers of the Agong may be termed 'crisis' powers, that is powers which come alive **only when** there is a constitutional impasse, but would otherwise lie dormant.

[234] In my view the above statement uncannily reflects the Perak situation. In the exercise of His Royal Highness' powers and duty as Head of State, the said prerogative power which is latent and unobtrusive, can now be called upon to contain any imminent catastrophe.

[235] As long as there is peace, no known or perceived constitutional impasse or any situation of that ilk, the ruler is not likely to be confronted with any such obligation to exercise his prerogative. The exercise of this prerogative power is all the more critical if the normal government machinery breaks down. The Royal Prerogative in time of real or apprehended crisis differs in degree rather than kind from the general common law doctrine of necessity.

[236] It is my view therefore that the prerogative and discretionary powers are not as antiquated as they might seem and are certainly far from being a relic of bygone days.

[237] This situation is not any more different than that found in the Monarch's power in the United Kingdom. For example, after the collapse of Ramsay MacDonald's Labour Government in 1931, George V encouraged the formation of a National Government under MacDonald's leadership. Thus in such times, the ruler's prompt and prudent decision is critical. In this, Dicey had

stressed the presence of residual features of the prerogative within the realm. Though admittedly, the Queen's prerogatives differ to some extent from that of Malaysian Constitutional monarchs, the principle of its application remains the same.

[238] In such times as much as the ruler is mindful of the limitation placed upon his prerogatives and the rakyat acknowledges that His Majesty is guided only by his prudence and wisdom and having only their interests at heart, then the expression "The King is dead. Long live the King!" would have meaning and gives comfort to his subjects, of the continuing peace, protection and tranquility afforded them by the Ruler. Taken in this light, the said enquiry was conducted in the best traditions of exercising His Royal Highness' executive and prerogative power. As can be discerned, the said enquiry was a 'fact-finding mission' to ascertain the facts, the existence of which should necessarily precede the exercise of His Royal Highness' prerogative powers under art. XVI(6).

[239] In this, the element of objective assessment as opposed to a subjective one as demanded by Nizar under art. XVI(6) have been more than credibly met.

[240] In any case His Royal Highness was exercising his prerogative powers which are discretionary under art. XVIII(2)(b). The decision thereof is non-justiciable (*Council, Civil Service Unions and Minister of the Civil Service* [1984] All ER 956). That decision to withhold His Royal Highness' consent even given its plain and ordinary reading, predicated on the facts, is well within the realm of His Royal Highness' absolute power.

[241] His Royal Highness' conduct of the enquiry was well within the parameters or ambit of art. XVI(6). In this connection, it is clear that His Royal Highness had acted constitutionally.

[242] Thus having established the facts of the first and related issue, the parallel issue (or second issue) which had lately occupied so much space in our national psyche needs to be urgently addressed.

A

Second Issue

The Second Issue Is Whether The Learned Judge Was Right In Holding That There Must Be A Motion Of No Confidence Against Nizar Passed In The Legislative Assembly Before He Ceases To Command The
B *Confidence Of The Majority Of The Members Of The Members Of The Legislative Assembly*

[243] The popular sentiment is that there must be a motion of no confidence taken on the floor of the Assembly before any Chief
C Minister or Menteri Besar can be determined to have ceased command of the confidence of the majority.

[244] I am aware that this is the 'trigger issue' as labelled by Nizar. However, the above issue as put by Nizar has some troubling aspects. My reasons will follow.

D

[245] It is Nizar's contention that since a vote of no-confidence by a majority of the members of the Assembly had not been taken against him, it cannot be said that he has lost the majority confidence of the Legislative Assembly. Nizar also took the
E position that in the absence of such vote, his dismissal by His Royal Highness was unconstitutional. This 'trigger issue' being the pre-condition to art. XVI(6), that Nizar had ceased to command the confidence of the majority, had not been met. What Nizar meant was that his loss of majority can only be ascertained, by a
F vote of no confidence taken in the Legislative Assembly. And by no other means.

[246] That this 'loss of confidence' issue is couched in peremptory terms, forces me to contemplate whether this is really
G a democratic principle. Whatever it is, it reflects an imperative. For ease of reference I shall hereafter refer to this issue as the 'loss of confidence' issue or 'imperative' whichever is applicable in the context herein.

[247] With utmost respect, the 'culprit' is of course the much-
H vaunted case of *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 which is considered to be the desired precedent of all time with regard to this issue. As far as I could remember, save for the cases of *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v. Tun Mohd Said bin Keruak & Ors*
I [1995] 1 CLJ 184 and *Tun Datu Hj. Mustapha Datu Harun v. Tun*

Datu Haji Mohamed Adnan Robert [1986] 2 MLJ 420 above, the 'loss of confidence' issue has not resurfaced since *Ningkan* was decided more than forty years ago. Nizar relied on *Ningkan*'s case to substantiate his claim. This was endorsed by the learned judge who decided that 'loss of confidence' of a majority of members can only be determined by a vote on the floor of the Legislative Assembly. He decided that that was the only test of such 'loss of confidence'.

[248] Is the learned judge correct in applying this test?

[249] Given the importance placed on *Ningkan*'s case in this area of constitutional law, it is time to critically appraise the same.

[250] The dismissal of Dato' Ningkan as the then Chief Minister of Sarawak, by the then Governor of Sarawak on 17th June 1966 triggered a chain of events of great constitutional importance. A brief account of the facts of the case are as follows:

[251] Dato' Ningkan received a letter on 16 June 1966 from the then Governor of the State calling upon him to tender his resignation on the ground that a majority of the members of the Council Negri (21 members) had represented by letters signed by them to the Governor that the Chief Minister had ceased to command their confidence. Dato' Ningkan's rebuttal was that there was no such indication in the proceedings of the Council Negri held just two days earlier, ie, on 14 June 1966. (No motion of no confidence of the majority of its members was taken and there was no defeat of any Government bill).

[252] Dato' Ningkan requested that a vote be taken in the Council Negri to test his political strength. He requested the Governor to convene the Council Negri for this purpose. Before that could happen, the Governor wrote a letter to Dato' Ningkan on 17 June 1966 notifying him that since he had refused to tender his resignation notwithstanding that he had lost the confidence of the majority of the members of the Council *via* the 21 signatures, the Governor had no choice but to declare that he and the other members of the Supreme Council have ceased to hold their respective offices. The Governor informed him that a new Chief Minister, Penghulu Tawi Sli has been appointed to replace him (Dato' Ningkan).

[253] In much the same approach taken by Nizar in this appeal, Dato' Ningkan then sought various declarations in court, the main ones being the unconstitutionality of the Governor's action and the invalidity of his purported dismissal. He said that 21 members out of a total membership of 42 members did not constitute a majority. He added that the Governor had no power under art. 7(1) of the Sarawak Constitution to dismiss him and even if he had, it must be limited to the situation where the Chief Minister had ceased to command the confidence of the majority of the members of the Council Negri. Dato' Ningkan said that the lack of confidence expressed against him is to be determined only by an adverse vote on the Council floor. He said that this was not done in his case. In reply, the Governor said that he had a duty to dismiss the Chief Minister if there is refusal on his part to tender his resignation, after he had lost the confidence of the majority of members in the Council. The Governor went on to say that it is for him to make a personal assessment as to whether the element of loss of confidence of the majority of members of the Council had been so satisfied. Dato' Ningkan was dismissed by the Governor. Dato' Ningkan filed a suit, challenging his dismissal.

[254] Thus before Harley Ag CJ in the High Court, the one critical issue to be decided was, in what manner and by what method was the lack of confidence to be expressed; whether such lack of confidence could be assessed only by a vote of no confidence on the floor of the house?

[255] The relevant article (art. 7(1)) of the Sarawak Constitution reads:

> Article 7(1) If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council.
>
> (2) A Member of the Supreme Council may at any time resign his office by writing under his hand addressed to the Governor, and a member of the Supreme Council other than the Chief Minister shall also vacate his office if his appointment there to is revoked by the Governor acting in accordance with the advice of the Chief Minister.

(3) Subject to Clauses (1) and (2), a member of Supreme Council other then the Chief Minister shall hold office at the Governor's pleasure.

[256] It is Harley Ag CJ's view, that after considering the facts and circumstances in ***Ningkan*, loss of confidence can only be measured by a vote taken by a majority of members on the floor of the Assembly**. (emphasis added)

[257] This is what His Lordship said:

> ... it seems to me that by the provisions of the Sarawak Constitution, **lack of confidence may be demonstrated only by a vote in Council Negri.** (emphasis added).

[258] Nothing more was expressed by His Lordship on this 'loss of confidence issue'. This is unfortunate. Although His Lordship produced an otherwise lucid judgment, the lack of analysis of the imperative of the 'loss of confidence issue' seems rather dismal. His Lordship's decision on this important constitutional point is therefore denuded of its *ratio*. His Lordship left the question open as to why he took that stand. In any case, a close scrutiny of *Ningkan* makes it possible to contemplate the reason as to why his Lordship decided the way he did. This will be explained shortly.

[259] The judicial pronouncement made in *Ningkan* above was endorsed by the court in *Tun Datu Hj. Mustapha Datu Harun v. Tun Datu Haji Mohamed Adnan Robert* [1986] 2 MLJ 420. The facts differed slightly from that in *Ningkan*. However on the occasion that Tan Chiaw Thong J had to make an observation on the method of how assessment of loss of confidence of the majority is to be made, His Lordship observed that:

> ... Even more so, would this situation apply in the case of dismissal **without a vote of no confidence from the House.** (emphasis added).

[260] However, it was in the Nigerian case of *Adegbenro v. Akintola* [1963] 2 WLR 63 that a whole new perspective on this issue made its presence.

[261] The Nigerian Federal Supreme Court earlier held that the Governor, in dismissing the Chief Minister, cannot constitutionally take account of anything in the matter of 'support' except in the record of votes actually given on the floor of the House. On appeal, the Privy Council in a reversal judgment speaking through Viscount Radcliffe observed that:

A His Lordships in the Privy Council, were unable to find any indication either in the general scheme or in other specific provisions, which would enable them to say that the Governor is legally precluded from forming his opinion upon the basis of anything but votes formally given on the House.

B **[262]** Locally, although the facts somewhat differed, a similar approach came close, on the heels of *Adegbenro*. This can be found in the observation of Abdul Kadir Sulaiman J, in *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v. Tun Mohd Said bin Keruak & Ors* [1995] 1 CLJ 184 who quoted *Adegbenro*'s case
C with approval.

[263] Briefly, this case concerns a petition signed by a majority of the members of the State Legislative Assembly stating that they had lost confidence in the Chief Minister of Sabah. It was held
D by the learned judge in the High Court that a vote in the Assembly is not the only means to determine the loss of confidence of a majority of members of the Assembly in the Chief Minister. It depends on the facts and circumstances. According to the judge, other extraneous matters may provide sufficient
E evidence to establish the fact of the Chief Minister ceasing to command the confidence of the majority of the members of the Assembly for the purposes of the Constitution of Sabah.

[264] His Lordship said in this case, referring to the construction
F of art. 7(1) of the Sabah State Constitution which is in *pari materia* with art. 7(1) of the Sarawak Constitution and art. XVI(6) of the Perak State Constitution that:

> … The expression of 'loss of confidence' is *not therefore, confined to a vote taken in the Assembly but depends on the circumstances which*
G *are capable of contributing sufficient evidence to indicate such lack of confidence.*
>
> After all there is nothing in the Constitution which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the floor of the Council Negri.
H
> Thus for the purposes of Article 7(1) of the Sabah State Constitution, *other extraneous sources which are properly established, are capable of contributing evidence to indicate such lack of confidence*. (emphasis added)

I

[265] Both the Privy Council in *Adegbenro* and Kadir Sulaiman J in *Amir Kahar* found that in the Constitution of West Nigeria and the Constitution of Sabah, there is nothing explicitly written in them, which can be construed as requiring that the test of confidence of the Chief Minister, or lack thereof must be assessed only by a vote of no confidence taken on the floor of the house.

[266] The relevant provision in the Constitution of West Nigeria as found in *Adegbenro v. Akintola* is s. 33(10) reads:

> 33(10) The Ministers of the Government of the Region shall hold office during the Governor's pleasure provided that:
>
> (a) the Governor shall not remove the Premier from office **unless it appears to him** that the Premier no longer commands the support of a majority of the members of the House of Assembly. (emphasis added)

[267] It was argued by Harley Ag CJ in *Ningkan*'s case that the words "unless it appears to him" in art. 33(10) of the Nigerian Constitution lends an element of subjectivity in the mind of the Governor when deciding the issue of dismissal of the Chief Minister. His Lordship said that **this was not expressed in the Sarawak State Constitution.** Nizar argued that the same could be said for the **Perak State Constitution, where the personal judgment of the Ruler to dismiss is not expressed in the relevant article.** (emphasis added).

[268] In *Adegbenro*, the Privy Council took the view that there was nothing either in the scheme or provisions of the Constitution which circumscribed the assessment of loss of confidence only to votes given on the floor of the house. Thus it was competent for the Governor to dismiss the Prime Minister upon receiving a letter signed by 66 out of a total of 124 members of the House of Assembly. The Privy Council decision was primarily based on the language of s. 33(10) of the Constitution of Western Nigeria.

[269] On this premise, the Privy Council held that the Prime Minister had been validly dismissed.

[270] Of primary interest and importance is the observation of Viscount Radcliffe in *Adegbenro* where His Lordship observed:

> … It is said too, that the 'support' that is to be considered is nothing else than the support in the proceeding of the House itself, and with this proposition also their Lordships are in agreement. They do not think however, that this is in itself a very pregnant observation. No doubt everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; *but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House*, and it appears to their Lordships somewhat unreal to try to draw and form dividing lines between votes and other demonstrations where the issue of 'support' is concerned. (emphasis added).

[271] In this, I do acknowledge that the Constitutional provision in the Constitution of West Nigeria empowers the Governor to make his judgment if 'it appears to him' the Chief Minister no longer commands the majority of members of the House of Assembly. It is left entirely to the Governor's own assessment and there is no limitation as to the material and resources on which he is to base his judgment or the contacts to which he may resort for the purpose.

[272] It is worth noting that in rejecting the decision of the Supreme Court of Nigeria which was distinguished in *Ningkan*'s case, the Privy Council clearly stated that there was no such limitation of gauging the loss of confidence only by taking a vote on the floor, found in the language of the Constitution. Secondly, it said that to impose such a limitation would tantamount to disregarding the reality of the political process. But that is the position in West Nigeria.

[273] With respect in this country the stand taken in *Ningkan* that the assessment of loss of confidence is acceptable only by votes taken on the floor of the Assembly, was diluted by the *dicta* of Hj Abdul Kadir Sulaiman J, in *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v. Tun Mohd Said bin Keruak & Ors* [1995] 1 CLJ 184. In this case, His Lordship observed that:

> … it is my judgment that to establish that a Chief Minister ceases to command the confidence of a majority of the members of the Assembly for purposes of Article 7(1) of the Sabah Constitution it *need not necessarily be dependent upon the actual motion to be tabled*

in the State Legislative Assembly. It may be available from sources outside the Legislative Assembly depending on the circumstances of each case. In this case, based on the circumstances presented to it, the Court is satisfied that the resignation of Datuk Pairin as the Chief Minister on 17 March 1994 is a resignation pursuant to him ceasing to command such a confidence. (emphasis added)

[274] Referring again to *Ningkan*'s case and examining the decision of Harley Ag CJ as against that in *Adegbenro* and *Amir Kahar*, let us examine why the *Ningkan* decision was decided the way it was. With respect, I had earlier expressed reservation on Harley Ag CJ's decision in *Ningkan*. The following facts might shed some light.

[275] In his anxiety to put *Adegbenro*'s case at arm's length from *Ningkan*'s, Harley Ag CJ made the observation that there are five distinguishing features in *Adegbenro*, not found in *Ningkan* and concluded that therefore the provisions in the West Nigerian Constitution are different from the provision in the Sarawak Constitution. Thus he said, it renders *Adegbenro*'s principles inapplicable to Sarawak. The five distinguishing features are:

(1) In the Nigerian case it was mathematically beyond question that more than half the House no longer supported the Premier.

(2) The measurement in Nigeria was a measurement of 'support', not of 'confidence'. The Sarawak Constitution is dated subsequent to the decision of *Adegbenro v. Akintola*, and it does seem to me that the *'confidence'* of a majority of members, being a term of art, *may imply reference to a vote such as a vote of confidence or a vote on a major issue.*

(3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.

(4) In Nigeria the Governor had express power to assess the situation 'as it appeared to him'.

(5) In Nigeria all ministers, including the Premier, held office 'during the Governor's pleasure'; although there was an important proviso to this.

> *All the above five points were peculiar to Nigeria, and not one of them applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri.* Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private views. (emphasis added)

[276] Now, whilst one could accept the differences found in points (2) (3) (4) and (5) above, the first point seems inconsistent with His Lordship's general approach as regards art. 7(1) of the Sarawak Constitution. Harley Ag CJ in *Ningkan* had been steadfast in his observation that lack of confidence may be demonstrated only by a vote on the floor of the Council Negri.

[277] As clearly expressed, in point (1), he concedes, unwittingly or otherwise, that the number of signatories (66 signatories) in Nigeria constituted a clear majority. Is Harley Ag CJ then saying that in *Ningkan*, if he was assured that if on a given day, there is a **clear majority** in any manner determined by the Council Negri that it no longer supports the Chief Minister, then he would have come to a different conclusion **even if there was no vote of confidence passed in the Council Negri?** (emphasis added).

[278] That appears to me to be the position Harley Ag CJ seemed to take. After scrutinising the facts and circumstances in *Ningkan* the answer could be this.

[279] Harley Ag CJ's seemingly inconsistent stand may well be due to the political reality found in Sarawak at that time. As succinctly put by Hj Abdul Kadir Sulaiman J in *Amir Kahar*:

> … The hard fact in that case (referring to *Ningkan*) was that the alleged loss of confidence was highly suspect. There was a top secret representation made by persons outside the Council Negri which on the face of it did not disclose that the representors were the majority of members in the Council Negri. Also the fact represented was suspicious in the sense that the letter was not signed by all the persons listed in the letter and even in respect of those who signed, one of them was represented only by a 'chop'. It was for that reason the learned judge said at page 193: "Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private view.

[280] Given the above, could it be because of these furtive elements existing in the then political scenario that Harley Ag CJ in *Ningkan* was intractable in his view that the loss of majority may only be determined by votes on the floor of the Council Negri? The political climate then was such that Harley Ag CJ himself observed that:

> … The plaintiff (Ningkan) did not refuse to resign: he merely expressed doubts whether in fact he had ceased to command a majority and requested that the matter be put to the constitutional test.

[281] Given the volatility of Sarawak politics then, where underlying political tension was rife, with political parties like PESAKA, BERJASA and PANAS amongst others, entering the fray, it was little wonder that Dato' Ningkan himself was in a state of flux. Those keen to topple Dato' Ningkan avoided taking a motion of no confidence, as loyalties were fluid, and shifts of political allegiance were not unusual, given the hugely diverse native groups, each absorbed with their ancient antagonisms and rivalry. Thus it would be a risky venture to take a vote on the floor of Council Negri. Anything can happen. Instead they resorted to taking signatures of 'members', of which only 21 were obtained. Even those 21 signatures bore evidence of one of it being dubious.

[282] However the matter worsened when it was learnt that the letter to the Governor containing the said 21 signatures came from Temenggong Jugah, who himself was not a member of the Council Negri. Thus it was not even certain whether genuine members or outsiders had signed the letter, expressing loss of confidence against Dato' Ningkan.

[283] The frenetic political situation could well be the reason for Harley Ag CJ's strict compliance with the 'convention' of ascertaining loss of confidence of the majority of the Assembly whereby only an adverse vote taken on the floor of the Council Negri would count, in determining loss of confidence.

[284] However in my view it is Harley Ag CJ's first 'distinguishing feature' which cracked his armour. To express that it was mathematically beyond question that more than half of the House no longer supports the Premier represents a 'distinguishing feature' from the *Ningkan* case, greatly diluted the strength of *Ningkan* as

A authority for the proposition that the ONLY mode of establishing the fact that a Chief Minister ceases to command the confidence of the majority of the member of the Council Negri is by a motion taken on the floor of the Assembly.

B **[285]** In *Ningkan*, the 21 signatures were in themselves clearly not indicative of a majority since 21 out of 42 members could hardly amount to a majority. Thus Dato' Ningkan himself quite rightly argued that there was no loss of majority support against him as alleged.

C **[286]** Unlike *Ningkan*'s case however, in *Nizar*'s case, 31 out of 59 members of the Assembly pledged their support for Barisan Nasional. Their support was unequivocal. They were interviewed personally by His Royal Highness. They pledged their allegiance and support for Barisan Nasional before His Royal Highness. In
D this, there could hardly be a more empathic demonstration of majority support for Barisan Nasional.

[287] As slender as was the loss of majority in *Nizar*'s case, the defection of only three Assemblymen however had a devastating
E effect on the balance of power in the Legislative Assembly.

[288] As any politician will know, there is nothing more painful than having to face loss of majority support in the House especially after a rousing and rivalrous campaign. This was the case when
F Neville Chamberlain the conservative Prime Minister in the United Kingdom whose normal majority of about 200 was reduced to 81. He resigned in 1940, upon realising that he had lost the confidence of his own party as well as that of the Labour Party. To some extent, such was the situation in *Nizar*'s case.

G **[289]** There is another point I believe to be the reason, for Harley Ag CJ's approach when he subconsciously or otherwise, regarded a particular convention which is applied in Westminster and followed in some other Parliamentary systems of government,
H to be applicable in *Ningkan*. This is the issue before us now. That is, the 'convention' of taking a motion on the floor of Parliament or Assembly for a vote especially of any major issue which amongst others, include an adverse vote of confidence by a majority of members of Parliament or Assembly. That because this
I convention is generally observed in most parts where there is a Parliamentary system, its application was taken as a matter of

course. Harley Ag CJ assumes that the convention applies in *Ningkan*. In my view, the argument is more interesting for the assumptions on which it rests than for any intrinsic merit, for it posits the idea that this convention is binding.

[290] It would appear from the position taken by Harley Ag CJ that any departure from this convention is not only frowned upon. It is taken to be a breach. For such is the effect of conventions. Since even if conventions are said have no force of law, it is still regarded as binding and obligatory to those who apply or should apply them, and to those who expects them to be applied.

[291] So in the *Ningkan* situation, it is hardly surprising that given the then political turmoil and covert politics, it is little wonder that Harley Ag CJ stood his ground. That the only way to determine the loss of majority confidence of members of the Council Negri was to take a vote on the floor of the Council Negri.

[292] This convention is regarded by most, to be the litmus test. It is said to represent the best of democratic principles. The argument forwarded by Nizar too seems to be that this 'loss of confidence' issue is a convention.

[293] Even Viscount Radcliffe in *Adegbenro* gave his unabashed approval to this convention where he said that:

> ... **'support'** that is to be considered, is **nothing else than support in the proceedings of the House itself** and with this proposition also their Lordship are in agreement. (emphasis added)

[294] However as clearly explained later, the Privy Council took the position that following a British precedent might not be practical in the circumstances of the case *(Adegbenro)*. Especially if "... the Governor's power of removal is not limited in such precise terms as would confine his judgment to be actual proceeding of the House, unless there are compulsive reasons to be found in the context of the Constitution ..."

[295] To seal the fate of the *Ningkan* decision further so to speak, Harley Ag CJ was much taken with the view expressed by Dicey.

[296] Harley Ag CJ quoted Dicey with approval. This is an extract of Dicey in the *Ningkan* decision:

A

> … the nation expects that a Minister who cannot retain the confidence of the House of Commons, shall give up his place, and no Premier even dreams of disappointing these expectations.
>
> But the sanctions which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offenders into conflict with the Law of the Land.
>
> … the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first, and ultimately to the will of the nation as expressed through Parliament.
>
> Of course therefore, a Minister or a Ministry must resign if the House passes a vote of want of confidence.

[297] Now, how would one interpret Harley Ag CJ's acceptance of the above opinion expressed by Dicey? Dicey was obviously speaking of the British Constitution (as Harley Ag CJ himself admitted). It must be remembered that in the United Kingdom, Parliament is supreme. So the will of the House of Commons is an imperative. Not so in this country. The Constitution is supreme.

[298] In the above opinion Dicey argued that breach of convention would almost at once bring the violator into conflict with the law of the land. In my view Dicey's argument cannot be accepted as a general proposition because some breaches of conventions will not invite sanctions, but would result in political difficulties.

[299] But in approving the jurisprudence as expressed above, Harley Ag CJ went on to say that:

> … the same principles apply *mutatis mutandis* to the Constitution of Sarawak.

[300] As can be seen, Harley Ag CJ was much influenced by the obligatory imposition of this particular convention. Thus the imperative language used by Harley Ag CJ in *Ningkan* is to be expected.

[301] It does not help of course, that Harley Ag CJ seemed to be influenced too, by the fear that the violators of conventions might be in conflict with the law of the land, as darkly warned by Dicey. A

[302] The question now is: How much weight should be given to the seemingly irreplaceable usage and binding effect of Harley Ag CJ's *dictum*? The next question is: What is the position of constitutional conventions in this country? The following question is: Is this particular 'English' convention (of voting on the floor of Assembly to gauge loss of a majority support or loss of confidence) a convention too, in this country? That, I believe is the crux of the matter. B C

[303] In this, one has no choice but to look again to our heritage to get the answer. Taking up where I left off, it is instructive to remember that a number of conventions practiced in Westminster have in fact been incorporated in the Federal Constitution. D

[304] When that happens, they can no longer be regarded as conventional practices but binding rules. An example is this. In England, it is a convention that the Queen acts on the advice of her Ministers. In Malaysia it is a rule of the Federal Constitution as provided for in art. 40. E

[305] It is true that not all the Westminster conventions that have been adopted in Malaysia. For if it were, some of those conventions would surely come in useful in the instant appeal. F

[306] For instance amongst others, it is a British convention that if the Prime Minister loses the confidence of members of the House and the Sovereign withholds dissolution, then he and his Ministers must resign, unless the Sovereign then dissolves Parliament. But this convention, I am afraid is, not embodied, codified or inserted in the Federal Constitution. At least not in express terms and more's the pity. G

[307] Naturally the next question arises: What is constitutional convention? H

[308] At the time when the former colonies obtained independence from Britain, they adapted many of the constitutional practices established by the English legal and constitutional system. Malaysia included. I

[309] However the framers of our constitution did not incorporate all of them. They incorporated only those which would accord with the practical reality, usage and custom of this country. Or what they believed to be so. But what of those incorporated ones?

[310] This is where the problem starts, since some conventions are hard to pin down and define. But once they are accepted and followed, they might have obligatory effect. In my view, one of the more useful purposes of conventions is to define the parameters of constitutional discretion and the manner in which it is to be exercised. In short conventions help 'limit' the discretionary authority reposed in the government or sovereign.

[311] In my view, the codification of some constitutional conventions such as those found in arts. XVIII(2)(a) and (b) of the Perak State Constitution, underscores the delicate decision-making process any Head of State would encounter when several discretionary powers (eg, whether to dissolve Parliament/Assembly or to withhold consent and to appoint Prime Minister on Cabinet), since it clearly involves the exercise of political judgment. As elegantly framed by the Supreme Court of Canada in reference *Re. Amendment of the Constitution of Canada* [1982] 125 DLR (3d) 1, 84:

> … the main purpose of conventions is to ensure that the legal framework of the Constitution is operated in accordance with the prevailing constitutional value of the period.

[312] This underscore the point that "even when the constitution specifically confers discretion on the Ruler, conventions may arise to regulate the same". (*Halsbury's Lord of England,* vol. 2)

[313] A quick look at para 29 of Nizar's written submission is interesting. It reads:

> 29. In *Amir Kahar* the "extraneous sources" relied upon were not only evidenced by the petition of 30 Legislative Assembly members but also by the public admission of Pairin himself that he had lost confidence of the majority and then tendering his resignation. Under such circumstances, *there is little need for the Legislative Assembly to pass a vote of no confidence when the Chief Minister himself had publicly acknowledged that he had lost support of the majority and would resign, and indeed resigned.* Assuming that

> Pairin had refused to resign as CM, the case would then have taken a different dimension. The situation and the circumstances of the present case are quite different from that of *Amir Kahar*. Here, taking *Zambry*'s case at its best, there was a situation of potential deadlock: 28-28. (emphasis added)

[314] In view of the above, is it Nizar's position that in the event the Chief Minister (in *Amir Kahar*) acknowledges and accepts his loss of majority and resigns, then how that loss of majority came about is irrelevant? There is no compulsion for an adverse vote to be taken on the Assembly floor?

[315] Can it be true then that Nizar falters a little from his stand taken earlier? Does this indicate that the 'alternative means' or 'extraneous factors' in determining this 'loss of confidence' issues are acceptable after all? The above position taken and the unequivocal observations made by both the Privy Council in *Adegbenro* and Kadir Sulaiman J in *Amir Kahar* strengthens my believe that the measure of loss of confidence in the majority is not exclusively limited to a vote taken on the floor of the Assembly.

[316] Firstly, the learned judge was clearly wrong in construing that this specific mode is the only mode to be applied, and that in its absence Nizar's ouster is considered unconstitutional.

[317] I agree with the decisions of both *Adegbenro* and *Amir Kahar*, that there are alternative means and extraneous ways of expressing lack of support.

[318] Even if the decision in *Amir Kahar* is said to be *obiter*, its importance is not diminished, for it reflects the political realities of the day. Even if no subjective element and latitude is afforded the Governor as in *Adegbenro* (in his search for evidence of support of majority or lack of it) the exercise of prerogative and discretionary powers of the ruler in Nizar's case, necessarily gives another dimension to this issue.

[319] These fortifies my believe that the 'loss of confidence' issue has to be looked at again.

[320] In view of these, the question arises. Is a motion taken on the floor of the Assembly/Parliament to determine loss of confidence of a majority members a convention in this country? And therefore binding?

[321] Quite apart from the notable absence of such express and imperative terms in the Federal Constitution, as well as in art. 7(1) of both Sabah and Sarawak Constitutions and art. XVI(6) of the Perak State Constitution, the authorities themselves do not reflect the existence of such a convention.

[322] The lone 'precedent' in *Ningkan* (and to some extent in the *Datu Tun Mustapha's* case), as opposed to the contrary view held in *Adegbenro* and *Amir Kahar*, could not possibly in my view, make the ruling on this 'loss of confidence' issue in *Ningkan* a convention which is obligatory and binding.

[323] The very fact that a subsequent ruling departed from the *Ningkan* ruling defies its very status as a convention. The *Ningkan* phenomenon stands all by itself. In other words, a single swallow does not make a summer.

[324] In view of the circumstances above, I disagree with the learned judge that the *Ningkan* decision is applicable in the instant appeal. In fact the *Amir Kahar* decision on the facts are more pertinent.

[325] In *Amir Kahar* the language of art. 7(1) of The Sabah Constitution is in *pari materia* with art. XVI(6). Even if *Adegbenro* is said by Nizar to be distinguishable, in view of the dismissal being subject to the personal judgment of the Head of State, *Amir Kahar* does not bear that impediment.

[326] In *Amir Kahar,* the said 30 members of the Council Negri expressed on the broadcast media that they no longer had confidence in Datuk Pairin. Though they requested the Governor to convene the Assembly to table a motion of no confidence, this was pre-empted by the resignation of Datuk Pairin. Datuk Pairin recognised the time honoured convention that when he loses the confidence of a majority of members of the Council Negri, the honourable thing to do is to tender his resignation. Due to defection of his PBS members to Barisan Nasional, the Barisan Nasional now had a majority. He tendered his resignation, paving the way for Barisan Nasional to form the next government.

[327] In *Nizar*'s case, the three ADUNs had left Pakatan. They pledged support for Barisan. This fact was told to Nizar. Even assuming for a moment that we agree with Nizar that he was unaware of their withdrawal of resignation, this fact was

nevertheless told to him by His Royal Highness on 5 February 2009. Thus he knew. Just as Datuk Pairin had known. But what happened? Why did Nizar request for dissolution? Nizar knew that he could not possibly muster enough support within that time to keep his 'ship' on an even keel.

[328] It is baffling that if Nizar had indeed put such great store by the convention that the determination of loss of confidence could only be accepted through a motion taken on the floor of the Assembly, why was this course of action not taken?

[329] If Nizar truly felt that he stood an even chance, if not a good chance of regaining support, he could have requested His Royal Highness for a convening of the Legislative Assembly which was then not sitting instead of requesting for a dissolution. In fact, as at 2 February 2009, he still had a majority of one, since the Assemblywoman from Jelapang had still not 'resigned'. He was still the Menteri Besar. He was still in the 'driving seat'. It is Nizar's case that the Speaker had requested His Royal Highness to convene the Legislative Assembly for this purpose. But the Speaker made this request on 6 February 2009. It was after Nizar had been informed that His Royal Highness had withheld his Majesty's consent to his request. But is the Speaker authorised to make such request? In that it lies within the province of the Menteri Besar? In any case, that request is of no effect and has no legal basis after His Royal Highness had refused Nizar's request to dissolve the Legislative Assembly.

[330] However, as the *Amir Kahar* decision had shown, the mode of expressing loss of confidence is not confined to a vote taken on the Assembly floor by a majority members of the Legislative Assembly. The similarity with *Amir Kahar*'s case is not so much the mode of expressing loss of confidence by majority of members. (Which in my view is similar), but the fact that both Datuk Pairin and Nizar knew of the fact of their loss of confidence. The difference lies in the diametrically different paths taken by each of them, soon after knowing the fact.

[331] In my view too, if Nizar were to cling on to the *Ningkan* decision and disregard *Adegbenro* and *Amir Kahar*, it would appear that such a construction as regards the 'loss of confidence' issue would have a negative effect on the current political realities.

A **[332]** Taking away for the moment the subjective element of the Governors' power in *Adegbenro*, is there impediment for the luminous pronouncement of the Privy Council in *Adegbenro*? Democratic politics being what they are, why would mature manifestations of the members' will not be allowed to be voiced,
B even if it is "short of actual voting"? (as described in *Adegbenro*)? (As shown in the unequivocal support of a majority of members of the Legislative Assembly in *Nizar*'s case before His Royal Highness).

C **[333]** For as long as the manifestations of their will are legitimate and are devoid of negative subjection why would that be disregarded?

[334] In the same way, if the *Amir Kahar* decision is not taken
D by Nizar my view is that to exclude any other mode except by motions taken on the floor of the Assembly, would have 'cribbed, cabinned and confined' members of the Assembly in expressing their free will. They are after all, representatives of the people. Would not this negative the very concept of democracy that each
E of them stands for?

[335] The position seems almost paradoxical. I am aware that there would be ferocious arguments that the will of the people is the electorate itself; that the supreme sovereignty of the people in making a choice is not to be negated.

F

[336] But this is not negated by the ruler's imposition of his will if circumstances demand it, because whatever his choice is, it appeals to the people to comprehend the entire dynamics of our constitutional make-up.

G

The third and final issue is the question of

Whether The Learned Judge Was Right In Holding That His Royal Highness The Sultan Of Perak Was Wrong In Appointing Zambry As The New Menteri Besar of Perak

H

[337] As clearly shown, *Ningkan* is not good authority for the situation in Perak. Nizar refused to resign even after it was clear he lacks majority support and dissolution was withheld. In *Ningkan*'s case, Dato' Ningkan had not refused to resign. He
I asked that the Assembly be convened to take a motion of no confidence. That never happened, since he was dismissed by the Governor.

[338] It was argued in *Nizar*'s case that by the express wordings in art. XVI(6), there is no power to dismiss him, *a fortiori* by virtue of the clear words in art. XVI(7) where he (Nizar) does not hold office at the pleasure of His Royal Highness. A

[339] In *Ningkan*, Harley Ag CJ said that he was not prepared to empower the Governor with the power of dismissal. He said that Ningkan's refusal to resign is not good enough reason for implying in the Sarawak Constitution, an enforcing power vested in some individual. Harley Ag CJ acknowledges that there is a *lacuna* here. B C

[340] In fact, to really understand the jurisprudence of *Ningkan*, one would have to look further. The High Court decision in his favour did not end there. As they say, the show is not over till the fat lady sings. D

[341] And so she did. In *Ningkan*'s case, in view of the constitutional impasse of having Datuk Ningkan stuck in the seat of the Chief Minister and the continuing political imbroglio, a State of Emergency was declared. E

[342] The matter even went right up to the Privy Council, taken by Datuk Ningkan on the point of the *bona fides* of the proclamation of the Emergency. Not on the point of the High Court decision. Which of course was not necessary since he had won. But because a good number of people were of the view that the Harley Ag CJ decision in *Ningkan* was in fact endorsed by the Privy Council, it is thus a precedent which is binding. That is certainly not true. The Privy Council made no comment on the Harley Ag CJ's decision. If at all, it made only an oblique reference to it. F G

[343] During the emergency, the Governor was empowered to dismiss Datuk Ningkan which he did. The question is: Why is the need for Emergency? Is there a *lacuna* in the Sarawak Constitution?

[344] In this, the Privy Council acknowledged that there was indeed a *lacuna* in the Sarawak Constitution. The Governor in Sarawak expressed that the right of dismissal ought to be given to him, as otherwise the Constitution would be unworkable. H I

[345] Likewise in *Amir Kahar*, there is no express provision in the Sabah State Constitution for the Chief Minister to resign since only the Executive Council members hold office at the pleasure of the Ruler or Governor as the case may be.

[346] The argument goes that since the provisions of the State Constitutions of Sarawak, Sabah and Perak show that the Chief Ministers of Sabah, Sarawak and Perak, unlike the other members of their Executive Councils, do not hold their office at the pleasure of the Head of State, the right to dismiss the Chief Ministers should be denied to the Heads of State of Sabah, Sarawak and Perak.

[347] It is in that connection that Tan Chiaw Thong J in the *Kitingan Case No. 2* endorsed the views expressed by Harley Ag CJ in *Ningkan* that a legally appointed Chief Minister should only be dismissed in accordance with art. 7(1) of the Constitution after a vote of no confidence had been taken against him in the Legislative Assembly. Tan Chiaw Thong J in the same case went on to say that in the absence of express provision in the Constitution giving any power of removal from office or dismissal, it showed that the Constitution did not intend that any such power should be given to the Head of State as otherwise it would have been expressly indicated.

[348] Before we go any further this issue of whether the legal power of dismissal is justiciable or otherwise, have been ruled by the Supreme Court which endorsed Tan Chiaw Thong J's ruling that it is justiciable.

[349] Given that there is indeed such *lacunae*, there is a genuine need for fully incorporating in explicit terms the issue of whether the right to appoint includes the right to dismiss (leaving aside the prerogative and discretionary powers exercisable by the Ruler). The *lacunae* exist, perhaps because such political or constitutional impasse was never contemplated. It might be of interest to note that Professor Jennings (who was one of the framers of our Constitution) in writing in the Cambridge Law Journal in November 1963, *inter alia* said that:

> It may be noted that where as the Pakistan Constitution of 1956 used "he is satisfied" the Malayan Constitution of 1957 did not. This seems curious, because in both cases the initial drafts were prepared by Mr. Justice Abdul Hamid and me. What happened, however, was that the initial drafts of the Malayan Constitution used the phrase "in his opinion", but that it was dropped by the Reid Commission. **I doubt if this was deliberate.** I have not been able to check the manuscript versions, **but it is quite likely that,** in making another amendment desired by the Commission, we **accidentally omitted "in his opinion"**. What went on in Trinity Hall is, however, irrelevant to the interpretation of the Constitution, and if the Judicial Committee were asked by the Yang di-Pertuan Agong for an interpretation of the Malayan (or Malaysian) provision they might well say that the absence of "is satisfied that" or "it appears to him that", or "in his opinion" makes all the difference. What can be said is that one of the draftsmen, at least, intended that the President of Pakistan and the Yang di-Pertuan Agong should have the same discretion as the Judicial Committee tried to give to the Governor of the Western Region of Nigeria.
>
> The importance of the opinion perhaps lies in the reiteration of the doctrine that a Constitution must be interpreted strictly like a statute, and that an appeal to British practice is of limited value. Though it has been said that "we must always remember that it is a Constitution that we are interpreting", it is usually wise to forget it, at least so long as they Privy Council controls the interpretation. This is not, however, a criticism of the particular opinion.

In my view this seems to suggest that the non-inclusion was accidental.

[350] Though the strict letter of the Constitution is to be observed as indicated by Jennings above, this merely goes to show that we might have regard to extraneous matters such as Jennings article above, in order to distill the original and true intent behind constitutional provisions as evident in the Federal Court decision in *East Union (Malaya) Sdn Bhd* [1980] 1 MLJ.

[351] Such 'gaps' may once again be made a subject of litigation, even in the face of clear principles.

A **[352]** However in Nizar's situation, the exercise of His Royal Highness' prerogative had legally forfeited Nizar's right to remain the Menteri Besar. Even assuming that Nizar was correct in saying that he held office not at the Ruler's pleasure by virtue of art. XVI(7), consider this proposition.

B

[353] On 17 March 2008, when he (Nizar) was appointed as the Menteri Besar, His Royal Highness exercised His Majesty's discretion under art. XVI(2) after considering who, in His Royal Highness's judgment is likely to command the confidence of the C majority of the members of the Legislative Assembly.

[354] Thus, Nizar was appointed on the collective strength of confidence of a majority of the members of Legislative Assembly. He was the Menteri Besar on their approbation, support and 'bounty', so to speak. Though there is no evidence that Nizar had D even tendered the resignation of the Executive Council, what is the effect if he had? If under art. XVI(6), he has to tender their resignation on whose bounty and support does he now stand in the Legislative Assembly? Now that the 'corpus' of his very existence has gone? Nizar's claim should fail and is untenable since E his 'substratum' has collapsed.

[355] Constitutionally, it is against the very principles of constitutionalism and rule of law that Nizar should still hang on to his office by nothing but pure legalism. Even though our F Constitution is continually evolving, various tugs and pulls at the seams of the Constitution should be minimised.

[356] I am aware that this argument can go both ways – but it is implicit that the cardinal principles of democracy have to be G balanced with the equally implicit understanding of the need to observe the most scrupulous constitutional decorum especially by those whose task it is to do so.

[357] In that regard, Nizar's position as Menteri Besar was no H longer tenable. The media announcement made by the Palace on 6 February 2009 was nothing but a mere declaration of the legal position. I need not say of course that the appointment of Zambry in the circumstances, was properly within His Royal Highness' prerogative powers pursuant to art. XVI(2) of the Perak State Constitution. I

[358] As I had indicated at the outset, only when a clear understanding of each other's constitutional rights and obligations in the entire constitutional conundrum is in place and due respect and observance given, would the metaphor of checks and balances of Ships of State on an even keel etc. could be maintained.

[359] Thus I share the view expressed by my learned brothers Raus Sharif, JCA and Ahmad Maarop JCA that in the context of this appeal, His Royal Highness had in the critical situation rightly exercised his constitutional powers as provided for under the Perak State Constitution solely for the best interests of his subjects. The decision being unanimous, the orders are as comprehensively set out in the judgment of my learned brother Raus Sharif, JCA.

Ahmad Maarop JCA:

[360] I have had the advantage of reading in draft the judgment by my learned brother Raus Sharif JCA. I agree that the appeal be allowed and the judgment of the High Court be set aside.

[361] In this judgment I will refer to the appellant as Zambry and the respondent as Nizar. Further, in this judgment, unless otherwise stated reference to "Article" or "Articles" means "Article" or "Articles" in the Laws of the Constitution of Perak ("the Perak State Constitution"). The brief facts of this case have been set out in the judgment of my learned brother Raus Sharif JCA who had also succinctly summed up the events leading to the appointment of Zambry as the Menteri Besar of Perak on 6 February 2009 which triggered the application for judicial review by Nizar in the court below. The High Court allowed Nizar's application and Zambry had preferred an appeal against that decision. Hence the appeal before this court.

[362] In his judgment my learned brother Raus Sharif JCA had identified three major issues that had arisen for consideration of the court. I will deal with these issues in turn.

Whether The Request For The Dissolution Of The Legislative Assembly Was Made Under art. XXXVI(2) Or art. XVI(6)

[363] I agree with the conclusion made by Raus Sharif JCA. On the facts available before the court, the only conclusion that could be arrived at is that the request by Nizar for the dissolution of the Legislative Assembly was made under art. XVI(6) and not

A under art. XXXVI(2). There is also no doubt in my mind that on 5 February 2009, Nizar had ceased to command the confidence of the majority of the members of the Legislative Assembly.

Whether The Learned Judge Was Right In Holding That
B **There Must Be A Motion Of No Confidence Against Nizar Passed In The Legislative Assembly Before He Ceased To Command The Confidence Of The Majority Of The Members Of The Legislative Assembly**

C **[364]** This is actually the crucial issue which lies at the heart of this appeal.

[365] In the court below the learned judge held that the loss of the command of the confidence of the majority of the members of the Legislative Assembly could only be determined by a vote of no
D confidence in the Legislative Assembly. In support of his conclusion, the learned judge chose to follow the decision in *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187 *("Ningkan")*. In his formidable submission supporting the decision of the learned judge, Tuan Haji Sulaiman,
E learned counsel for Nizar, urged this court to follow, adopt and apply the decision in *Ningkan*. In declining to follow *Ningkan*, my learned brother Raus Sharif JCA had dealt with the facts and circumstances which distinguished *Ningkan* from the present appeal. I will not repeat them. I agree with my learned brother's decision
F not to follow *Ningkan*. As would be clear later in this judgment, I prefer the judgment in *Datuk (Datu) Amir Kahar Tun Datu Haji Mustapha v. Tun Mohd Syed Keruak & Ors* [1995] 1 CLJ 184 and the Privy Council's judgment in *Adegbenro v. Akintola* [1963] AC 614. In addition to what had been said by my learned brother
G about *Ningkan* I would add my own views about it.

[366] In considering the crucial issue before him, namely how the lack of confidence was to be expressed and whether such lack of confidence could be assessed only by a vote on the floor of the
H House, the learned judge in *Ningkan* referred to *Adegbenro*. After quoting extensively from the judgment of Viscount Radcliffe, (delivering the judgment of the Privy Council), the learned judge in *Ningkan* said:

I > In my view the Privy Council's judgment relating to the Constitution of Nigeria does not apply to the Constitution of Sarawak because of the following distinguishing features and circumstances:

(1) In the Nigerian case it was mathematically beyond question that more than half the House no longer supported the Premier.

(2) The measurement in Nigeria was a measurement of "support", not of "confidence". The Sarawak Constitution is dated subsequent to the decision of Adegbenro v. Akintola, and it does seem to me that the "confidence" of a majority of members, being a term of art, *may imply reference to a vote such as a vote of confidence or a vote on a major issue.*

(3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.

(4) In Nigeria the Governor had express power to assess the situation "as it appeared to him".

(5) In Nigeria all Ministers, including the Premier, held office "during the Governor's pleasure"; although there was an important proviso to this.

All the above five points were peculiar to Nigeria, and not one of them applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri. Men who put their names to a "Top Secret" letter may well hesitate to vote publicly in support of their private views. (emphasis added)

[367] It is clear to me that, the brief passage in the judgment which I have underlined contains the conclusion of the learned judge in *Ningkan* on the issue he had to decide and the reasons for such a conclusion. The learned judge gave two reasons for his conclusion. First, in his view, *Adegbenro* was distinguishable from the case before him. Second, it seemed to him that "by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri". I will straight away deal with the first reason. This concerns the five distinguishing features which the learned judge had identified. Of these, only the third and fifth features were peculiar to *Adegbenro*. The fourth distinguishing features appears to be more relevant but to me it is by no means decisive. Explaining this in the context of art. 6(3) and art. 7(1) of the Sabah State Constitution (which are in *pari material* with art. 6(3) and art. 7(1) of the Sarawak State

Constitution and art. XVI(2) and art. XVI(6) of the Perak State Constitution), in *Amir Kahar*, Hj Abdul Kadir Sulaiman J (later FCJ) said:

> On the fourth feature and circumstance, no doubt the Nigerian case concerns the subjective decision of the Governor but the Nigerian case before the Privy Council concerns the meaning to be given to the expression "Premier no longer commands the support of a majority of the members" as mentioned by Viscount Radcliffe at page 70. In the Sabah Constitution the expression 'to command the confidence of a majority of the members of the Assembly" appears in Article 6(3) and Article 7(1). Article 6(3) concerns the subjective decision of the Yang di-Pertua Negeri just as s. 33(10) of the Constitution of Western Nigeria concerns the subjective decision of the Governor, *but what we are concerned now is with the meaning to be given to the expression "to command the confidence of a majority of the members of the Assembly". A different meaning cannot be given to the same expression appearing in Article 6(3) and Article 7(1) of the Sabah Constitution.* In my view, one involves the state of mind of the Head of State – Article 6(3), and the other involves the state of mind of the Chief Minister – Article 7(1), but in as far as the meaning to be given to the said expression in Articles 6 and 7 that expression must bear the same meaning. In my view, for the reason I gave earlier in this judgment, a vote in the Assembly is not the only means to determine the confidence but depending on the circumstances. A situation may arise where other extraneous matter or material may provide sufficient evidence to establish that fact of the Chief Minister ceasing to command the confidence of a majority of the members of the Assembly for purpose of Article 7(1) of the Constitution. (emphasis added)

[368] To me the most interesting distinguishing feature is the first. Describing the first distinguishing feature, the learned judge in *Ningkan* said that in the Nigerian case *(Adegbenro)*, it was mathematically beyond question that more than half the house no longer supported the Premier. One learned writer had commented that this distinguishing feature was irrelevant to the issue before the court (See S. M. Thio, *"Dismissal of Chief Ministers"* [1966] 8 MLR 283). I would go further than that. To me that distinguishing feature could not qualify as a valid distinguishing feature because the issue before his lordship was – how the lack of confidence was to be expressed and whether such lack of confidence could be assessed only by a vote of no confidence in the Sarawak Legislative Assembly, and in *Adegbendro*, no vote of no confidence

was passed on the floor of the House. Was his Lordship in *Ningkan* saying that if in the case before him he was satisfied that on the evidence then available that more than half of the members of the Legislative Assembly no longer supported the Chief Minister, his decision would have been different even if no vote of no confidence was passed in the Legislative Assembly? It appears to me that the first distinguishing feature weakened the argument that *Ningkan* was distinguishable from *Adegbenro* and thereby diminishing the strength of *Ningkan* as the authority for the proposition that the only mode of establishing the fact that a Chief Minister ceases to command the confidence of the majority of the members of the Legislative Assembly would be a vote of no confidence passed in the Legislative Assembly.

[369] The second distinguishing feature identified by the learned judge is not convincing. As said by the learned judge in *Amir Kahar* "no doubt the measurement in Nigeria was a measure of "support", not of "confidence", but ... to my mind the effect is the same", because in his view:

> the difference in the meaning of the two words is not real and substantial but merely a matter of saying the same thing in a different way. When someone has no confidence in another, he is in effect not in support of that other in the sense that he no longer has the trust in that other. When one supports the other he will vote for that other on any issue, just as when he has confidence in that other, he will vote for that other on any similar issue.

I agree. Further, the learned judge in *Ningkan* said:

> it does seem to me that the "confidence" of a majority of members, ... **may imply** reference to a vote such as a vote of confidence or a vote on a major issue.

I make two observation regarding that sentence. First, the learned judge was reading an implication into art. 7(1) of the Sarawak State Constitution (which is in *pari material* with art. XXVI(6)). No reason was given why such an implication must be read into the word "confidence". Second, the learned judge used "may imply" in the phrase "confidence may imply reference to a vote such as a vote of confidence or a vote on a major issue", giving it a directory (ie, optional) as opposed to a mandatory character.

[370] This brings me to the second reason given by learned judge in *Ningkan* for his decision on the first issue (ie, how the lack of confidence was to be assessed). His Lordship said, "It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri". There was no elaboration or explanation. The discussion on the first issue ended there, and then his Lordship proceeded to discuss the second issue – Has the Governor of Sarawak power at all, to dismiss the Chief Minister. In his submission, learned counsel for Zambry, Dato' Cecil Abraham, referring to the aforesaid conclusion of the learned judge, submitted that the learned judge did not support the proposition he made with analysis or reasons. I agree. That very brief conclusion of the learned judge obviously leaves the nagging question – which provisions of the Sarawak Constitution provide that lack of confidence can be demonstrated only by a vote on the floor? I will demonstrate shortly that the answer to that question is that just as in the case of the Perak State Constitution, there is no such provision. Indeed, even the learned judge seemed to accept that a vote on the floor of the House is the normal test (and not the only test) of lack of confidence:

> If one starts, as I think one should start, with the rule that a vote on the floor of the House is **the normal test of lack of confidence.** (emphasis added)

[371] I turn to the judgment of the learned judge in the court below. In his judgment the learned judge held that the use of the phrase "who in his judgment is likely to command the confidence of majority" in art. XVI 2(a) required the exercise of a personal judgment on the part of His Royal Highness. However, according to the learned judge, the same thing could not be said regarding art. XVI(6). This is because the expression 'in his judgment' was not used in art. XVI(6), which according to him should be given its plain and ordinary meaning. So, he held that just because His Royal Highness had formed a judgment that Zambry was likely to command the confidence of the majority for the purpose of appointing Zambry as Menteri Besar under art. XXVI(2)(a), it did not mean that His Royal Highness' opinion or judgment was applicable in deciding that Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly. In fact, the learned judge opined that the personal opinion or judgment of His Royal Highness was irrelevant to the construction of art. XVI(6). This is what the learned judge said:

In my view it is alright if His Royal Highness takes upon himself to determine who commands the confidence of the majority in the State Legislative Assembly that he can appoint as the Menteri Besar. Such determination however is only good for the purpose of appointing a Menteri Besar pursuant to Article XVI(2)(a) Perak State Constitution. This is so because that provision speaks of 'who in his judgment is likely to command the confidence of the majority'. The language use [sic] therein requires the exercise of personal judgment on the part of His Royal Highness.

But the same thing cannot be said with regard to Article XVI(6) in deciding whether the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly. In this case His Royal Highness, through his enquires has judged that the respondent has the support of the majority. But that finding does not necessarily mean His Royal Highness can form an opinion that the applicant ceases to command the confidence of the majority of the members of the legislative. One reason for this is that the expression 'in his judgment' is not used in Article XVI(6). It is trite that in construing a provision of a Constitution or a statute every word used in the Act or section or clause must be given its plain and ordinary meaning. If a clause or sub-section in the section of the Act is worded differently on the same issue, such as in relation to the issue of command of the confidence of majority in this case, then the clause or sub-section must be read in such a manner with regard to the same issue to give effect to the difference in the wordings. On this premise I am of the view that just because His Royal Highness had formed a judgment that the respondent is likely to command the confidence of the majority for the purpose of Article XVI(2)(a) to appoint the respondent as Menteri Besar it does not mean that His Royal Highness [sic] opinion or judgment is applicable in deciding that the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. In another word, one cannot say that because His Royal Highness has judged that the respondent is likely to command the confidence of the majority in the Legislative Assembly therefore the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly. I would say that the personal opinion or judgment of His Royal Highness is irrelevant to the construction of Article XVI(6). ('sic' by editor)

[372] The second reason given by the learned judge is that since art. XVI(5) of the Perak State Constitution provides that the Executive Council shall be collectively responsible to the Legislative Assembly, it is logical that it is the Legislative Assembly that determines whether it has confidence in the Menteri Besar as the Head of Executive Council:

> The second reason is that Article XVI(5) Perak State Constitution states that the Executive Council shall be collectively responsible to the Legislative Assembly. Under Article XVI(2)(a) the Menteri Besar is appointed to preside over the Executive Council. Article XVI(6) speaks of "if the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly ...". Reading these three provisions in Article XVI Perak State Constitution it is logical and in fact Article XVI(6) requires it to be so, that it is the Legislative Assembly that determine whether it has confidence in the Menteri Besar as the Head of the Executive Council. The Legislative Assembly may make the determination through a vote of no confidence against the Menteri Besar.

[373] With respect, I do not agree. At this stage it is appropriate to state the approach which the court should adopt in interpreting the provisions of a written constitution. In *Sukma Darmawan Sasmitat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 at pp. 486-487, Gopal Sri Ram JCA (now FCJ) said:

> There are several authorities that deal with the approach a court should adopt when interpreting the provisions of a written constitution and the following principles, ... may be distilled from them:
>
> 1. Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law-making power of the federation. It also creates and defines the various branches of government. It confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Or as Lord Diplock put it in *Attorney-General of The Gambia v. Momodou Fobe* [1984] AC 689 at p 700:

A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

2. A court, while rendering a broad and liberal construction to the language employed by the Federal Constitution, is not entitled to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors'. (Per Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR [1939] FC 1.) This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction 'which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory'. (Per Shelat and Grover JJ in *Kesavananda Bharati v. The State of Kerala* AIR [1973] SC 1481 at p 1581.) Thus, a court, for the purpose of rendering a harmonious interpretation, is entitled to make implications into the language of the constitution. An implication here refers to something that 'explains, perhaps limits, the effect of what is expressed'. (Per Windeyer J in *Victoria v. Commonwealth* [1971] 122 CLR 353 at p 401.)

[374] Since art. XVI(6) also refers to request for dissolution of the Legislative Assembly, in interpreting that article reference must be made to art. XVIII(2) (a) and (b) which provides:

(2) His Royal Highness may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say:

(a) the appointment of a Menteri Besar,

(b) the withholding of consent to a request for the dissolution of the Legislative Assembly.

[375] Thus withholding of consent to a request for the dissolution of the Legislative Assembly is within the absolute discretion of His Royal Highness. The exercise of this royal prerogative is non justiciable (*Council of Civil Service Union & Ors. v. Minister for the Civil Service* [1984] 3 All ER 935, *Juraimi Husin v. Pardons Board of State of Pahang & Ors* [2002] 4 CLJ 529 and *Amir Kahar*).

[376] Article XVI(6) of the Perak State Constitution provides:

> (6) If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

[377] It is immediately clear that there is nothing under Article XVI(6) (and indeed under any of the Articles under the Perak State Constitution) which provides that the Menteri Besar "ceases to command the confidence of the majority of the members of the Legislative Assembly" only after a vote of no confidence have been passed in the Legislative Assembly. In other words, Article XVI(6) does not prescribe nor limit the mode of establishing the fact that the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly. The Legislature could, if it was indeed its intention, prescribe under Article XVI(6), the mode which must be used to establish loss of confidence. For example it could have used the expression "ceases to command the confidence of the majority of the members of the Legislative Assembly on the passing by the Legislative Assembly a resolution of want of confidence in him". In fact in paras 2(3) and 26(3) in the proposed Fifth Schedule in the Draft Constitution of the Federation of Malaya, APPENDIX II to the Report of the Federation of Malaya Constitutional Commission, 1957, the formula in terms of the words I have underlined was used:

> The Menteri Besar shall also cease to hold office **on the passing by the Legislative Assembly of a resolution of want of confidence in him** unless he forthwith advises the Ruler to dissolve the State Legislature and the Ruler accepts the advice.

Similar expression was also used in para 8(3) in the Draft Constitution of the State of Penang, APPENDIX IV to the Report of the Federation of Malaya Constitutional Commission, 1957:

> (3) The Chief Minister shall also cease to hold office on the passing by the Legislative Assembly of a resolution of want of confidence in him unless he forthwith advises the Gavernor to dissolve the State Legislature and the Governor accepts the advice.

It is true that the words used in the above paragraphs are not the same as in art. XVI(6). But what is important is that the two paragraphs are provisions providing for the Menteri Besar or the Chief Minister respectively ceasing to hold office in a situation of loss of confidence in them. More importantly, both paragraphs provide the specific mode of assessing want of confidence.

[378] Alternatively, the legislature could, if it was indeed its intention to specify the mandatory mode of establishing the loss of confidence under art. XVI(6), have used the expression which the learned judge in the court below had implied into that Article in his decision, namely, "ceases to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly". But, none of the aforesaid expressions or anything similar to any of them was used by the Legislature in art. XVI(6) or any other articles. In my view, this was deliberate. In the circumstances, to construe "ceases to command the confidence of the majority of the members of the Legislative" in art. XVI(6) to mean "to have ceased to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly" as decided by the learned judge in his judgment in the court below, is to my mind, reading into that article a condition or restriction which was clearly not intended to be there, and for which there is no valid justification under the Perak State Constitution. Thus, as was observed by the court in *Amir Kahar*, regarding art. 7(1) of the Sabah Constitution (in *pari material* with Article XVI(6)):

> The expression loss of confidence is not, therefore, confined to a vote taken in the Assembly but depending on the circumstances, which are capable of contributing sufficient evidence to indicate such lack of confidence. After all there is nothing in the Constitution of Sabah which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the Assembly itself. If it is the intention of the framers of the constitution that it be so then an express provision to that effect would have been so provided.

In my view therefore, contrary to what was said by the learned judge in the court below, giving plain and ordinary meaning to art. XVI(6) cannot support the interpretation made by the learned judge.

[379] As I have said earlier, in arriving at his conclusion, the learned judge in the court below, basically relied on two reasons. The first was that since the expression "in his judgment" is absent from art. XVI(6), the expression "to command the confidence of the majority of the members of Legislative Assembly" thereunder could not be given the same interpretation as that given to the same expression under art. XVI(2) which warrants the exercise of personal judgment on the part of His Royal Highness. I will deal with the second reason first. The second reason given by the learned judge was premised upon art. XVI(5) which provides that the Executive Council shall be collectively responsible to Legislative Assembly. From that premise, the learned judge referred to art. XVI(2)(a), and then art. XVI(6), in respect of which the learned judge emphasised the expression, "if the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly". The learned judge then opined that reading those provisions it was logical and infact, in his view "Article XVI(6) requires it to be so, that it is the Legislative Assembly that determines whether it had the confidence in the Menteri Besar as the Head of the Executive Council", and that "Legislative Assembly may make the determination through a vote of no confidence against the Menteri Besar". With respect, I do not see the logic nor basis for such a conclusion. Collective responsibility means that the Executive Council acts unanimously even when all its members do not agree on an issue. In *Constitutional and Administrative Law* by Hilaire Barnett, 2nd edn, at p. 388, on Collective Responsibility, the learned author said:

> The convention of collective Cabinet responsibility emphasises the unanimity of government and its accountability to Parliament. The classic expression of collective responsibility remains that of Lord Salisbury:
>
> > For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues ... It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the essential principles of parliamentary responsibility established.

> The rationale for the convention lies in the need for government to present a united front to Parliament and the public in order to maintain confidence. A government which exhibits public disagreements over policy matters is one which will be regarded as weak, and will be subjected to challenges to its authority to continue in office.
>
> Two principal sub-rules underlie collective responsibility. The first rule is that, once an agreement is reached in Cabinet, all Members of Cabinet – and many outside Cabinet (see Chapter 10) – are bound to speak in support of the decision. There should be no criticism or dissent from the decision in public – irrespective of whether or not the particular member of Cabinet was party to the discussion. Equally, if a decision is reached by the Prime Minister in Cabinet Committee or the Inner Cabinet when only a small handful of Members are present, the decision binds all. The second supporting rule is that records of Cabinet discussions are absolutely secret. The knowledge that Cabinet records are protected by confidentiality, enhances the opportunity for Members of Cabinet to discuss matters freely, secure in the knowledge that their personal point of view, whatever the decision, will be protected from the public gaze.
>
> These principles are expressed in Questions of Procedure for Ministers in the following manner:
>
> Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees should be maintained. Moreover, Cabinet and Committee documents will often contain information which needs to be protected in the national interest. It is therefore essential that Ministers take the necessary steps to ensure that they and their staff preserve the privacy of Cabinet business and protect the security of government documents.

[380] In other words in the context of the Cabinet, collective responsibility means that Ministers must, like the three musketeers, act "all for one, and one for all" failing which they must resign. This is clear as stated in *"An Introduction To The Federal Constitution"*, by R.H. Hickling, published by the Federation of Malaya Information Services, where the learned author said:

A It is this principle of collective responsibility that constitutes the most peculiar feature of what we call Cabinet government. All the Ministers are collectively responsible to Parliament, and if one of them refuses to accept the views of his colleagues, then he is expected to resign: for the Ministers stand or fall together. This
B is, in effect, an illustration of the principle of the rule of the majority, or what is sometimes called "government by consent", in which those who disagree with the majority are nevertheless expected to accept their views. This, also, is the reason for the secrecy surrounding meetings of the Cabinet, and the brevity of Cabinet minutes, that is, the records of meetings of the Cabinet:
C for once policy has been decided by the Cabinet, it must be defended in Parliament by all members of the Cabinet. Ministers are, therefore, in the position of Dumas' three musketeers: they must act "all for one, and one for all", and if they fail to conform to this high ideal they must resign.

D **[381]** Collective responsibility of the members of the Executive Council of the State of Perak does not depend on the convention of collective responsibility (including whatever sub-rules and practice resulting therefrom), as accepted in the United Kingdom or any other jurisdiction. Collective responsibility of the members
E of the Executive Council of the State of Perak is provided for by art. XVI(5). All that the article provides is that the Executive Council shall be collectively responsible to the Legislative Assembly. There is nothing in that article, art. XVI(6) or any other article in the Perak State Constitution which provides that since the
F members of the Executive Council are collectively responsible to the Legislative Assembly, the vote of no confidence must be passed in the Legislative Assembly to establish the fact that the Menteri Besar ceases to command the confidence of the majority of the members by the Legislative Assembly.

G **[382]** This brings me back to the first reason given by the learned judge in the court below in support of his conclusion on the first issue. Although the words "who in his judgment is likely" is not present under art. XVI(6), it does not and cannot mean that
H "ceases to command the confidence of the majority of the members of the Legislative Assembly" must be construed as, "to have ceased to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly", as the learned judge had eventually concluded.
I Although the expression "in his judgement" is absent under art. XVI(6), that article uses the same expression used under art.

XVI(2) – "to command the confidence of the majority of the members of the Legislative Assembly". Article XVI(2) applies to an ordinary situation after the completion of an election pursuant to art. XXXVI(4). Article XVI(2) also applies to a situation where the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly like what happened in the present case. In this second situation, there is an inevitable interplay between the operation of art. XVI(2) and art. XVI(6). The expression "to command the confidence of the majority of the members of the Legislative Assembly" under art. XVI(2) and art. XVI(6) must be read in the context of the exercise by His Royal Highness of two distinct royal prerogatives provided under art. XVIII(2)(a) and (b) respectively. The first, under art. XVI(2) the expression must be considered in the context of His Royal Highness' discretion in the appointment of a Menteri Besar. The second, under art. XVI(6), the expression must be considered in the context of His Royal Highness' discretion in granting or with holding consent to a request to dissolve the Legislative Assembly. The interplay between art. XVI(2) and art. XVI(6) can be clearly seen if the intention underlying art. XVI(6) and His Royal Highness' constitutional duty under art. XVI(2) (to ensure that there must always be the Menteri Besar and an Executive Council to advise him so that the government of the State of Perak could be carried on), are considered. So, when the Menteri Besar who has ceased to command the confidence of the majority of the members of the Legislative Assembly requests His Royal Highness to dissolve the Legislative Assembly and His Royal Highness withholds his consent, art. XVI(6) commands that the Menteri Besar shall tender the resignation of the Executive Council (which includes himself). As will be clear later in this judgment, the refusal of the Menteri Besar to tender such resignation is unconstitutional and it is implicit that on such refusal the Executive Council and the office of the Menteri Besar is thereby vacated. When this occurs, His Royal Highness must carry out his constitutional duty under art. XVI(2) and appoint as new Menteri Besar, a member of the Legislative Assembly, who, in his judgment is likely to command the confidence of the majority of the members of the Legislative Assembly. In my view, in the light of the interplay between art. XVI(2) and art. (6) as aforesaid, there is no valid reason why "ceases to command the confidence of the majority of the members of the Legislative Assembly" under art. XVI(6) must be

construed to mean "to have ceased to command the confidence of the majority after a vote of no confidence had been taken in the Legislative Assembly", and that therefore His Royal Highness cannot carry out enquiries to satisfy himself that Nizar had ceased to command the confidence of the majority members of the Legislative Assembly. The unmistakable intention underlying the constitutional command under art. XVI(6) that the Menteri Besar shall tender the resignation of the Executive Council (including himself) when he ceases to command the confidence of the majority of the members of the Legislative Assembly is to enable a new Executive Council to be formed pursuant to art. XVI(2). In this regard, referring to art. 6 and 7 of the Sabah State Constitution (which are in pari material with art. XVI(2) and art. XVI(6), the learned judge in *Amir Kahar* said:

> The intention behind the requirement in Article 7(1) for a Chief Minister to tender the resignation of the members of the Cabinet is, in my view, to enable a new Cabinet to be formed pursuant to Article 6 of the Constitution. ...
>
> ...
>
> Article 7(1) envisages a situation where if the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, unless the Assembly is dissolved, the Cabinet shall be dissolved thus opening the way for a new Cabinet to be formed. This new Cabinet can comprise of members from the same party or otherwise, provided that the person to be appointed as the new Chief Minister to head this new Cabinet is, in the judgment of the Yang di-Pertua Negeri, likely to command the confidence of a majority of the members of the Assembly. See Article 6(3) of the Constitution. The dissolution of the existing Cabinet under Article 7 does not involve the Yang di-Pertua Negeri or necessarily, the members of the Legislative Assembly. The Article merely requires the Chief Minister to tender the resignation of the members of his Cabinet if he ceases to command the confidence of a majority of the members of the Legislative Assembly. To hold otherwise, in instances where a Chief Minister who in fact knows that he has ceased to command the confidence of a majority of the members of the Assembly cannot resign but to wait for the Assembly to be summoned and then for the Assembly to vote on the confidence would, in my view, create a legal absurdity and would result in a ludicrous situation. As the learned Counsel for the defendants puts it, this situation is definitely against the democratic principle upon which the Constitution and government is based ...

> ... The fact of a Chief Minister ceasing to command the confidence of a majority of the members of the Assembly can be evidenced by various situations and circumstances. It can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are not by any means exhaustive. There is nowhere in the Constitution to say that the only evidence of such fact must be through the actual vote in the Assembly.

Thus, as what was held in *Amir Kahar* with regard art. 6(3) and art. 7(1) of the Sabah Constitution (at p. 195), a different meaning cannot be given to the same expression (ie, "to command the confidence of the majority of the members of the Legislative Assembly) in art. XVI(2) and art. XVI(6).

[383] In addition to the two reasons adverted to earlier, in support of his conclusion, the learned judge in the court below also referred to the opinion of the Court of Appeal on the interpretation of art. 13(2) of the Constitution of Cook Islands in *Cook Islands, Reference by Queen's Representative* [1985] LRC (Consti). In his submission for the Intervener, the Attorney General contended that it was not safe to rely on *Cook Islands* case to interpret art. XVI(6) because, according to him, Article 13 of the Constitution of the Cook Islands envisaged three different situations where the appointment of the Prime Minister can be made. He argued that in the *Cook Islands* case, the Court of Appeal was of the view that under art. 13(2)(a) of the Constitution of Cook Islands, where Parliament is in session, the appointment of the Prime Minister would require a "vote of confidence in the candidate or some other unequivocal act of the legislature endorsing the candidate".

[384] I think there is merit in that submission. Article 13(2) of the Constitution of Cook Islands provides:

> 13. Cabinet
>
> (2) The Prime Minister shall be appointed as follows:
>
> (a) If the appointment is to be made while **Parliament is in session,** the Queen's Representative shall appoint as Prime Minister a member of the Parliament who commands the confidence of a majority of the members of the Parliament;

A (b) If the appointment is to be made while the **Parliament is not in session,** the Queen's Representative shall appointment as Prime Minister a member of the Parliament who in the opinion of the Queen's Representative, acting in his discretion, is likely to command the confidence of a majority of the members of the Parliament;

B

C (c) If the appointment is to be made after a **dissolution of the Parliament and before the holding of the general election of the Parliament following that dissolution,** the Queen's Representative shall appoint as Prime Minister a person who was a member of the Parliament immediately before that dissolution and who in the opinion of the Queen's Representative, acting in his discretion, is likely to command the confidence of a majority of the persons who were members of the Parliament immediately before that dissolution:

D

Provided that where the Parliament has been dissolved pursuant to subclause (2) of Article 37 hereof, the Queen's Representative shall appoint as Prime Minister a person who was a member of the Parliament immediately before that dissolution and who in the opinion of the Queen's Representative, acting in his discretion, is capable of performing the functions of the Prime Minister.

E

[385] Article 14(2) of the Constitution of Cook Islands provides:

F

The appointment of the Prime Minister who is in office at the commencement of the first session of the Parliament following a general election thereof shall be terminated by the Queen's Representative on the seventh day of that session if the Prime Minister has not sooner resigned.

G

[386] Two of the four questions asked of the Court of Appeal for opinion were:

(1) Is the Queen's Representative required by Article 14(2) to terminate the appointment of the Prime Minister, the Hon. G. A. Henry, within 7 days as therein prescribed, if the Prime Minister has not earlier resigned?

H

(2) If the answer to Question (1) is "Yes", then for the purposes of the appointment contemplated by Article 13(2)(a), is a vote required to be taken in Parliament expressing confidence in the Prime Minister?

I

[387] In delivering the opinion of the Court of Appeal, Sir Graham Speight emphasised the importance of the three different periods of time under art. 13(2) of the Constitution of Cook Islands:

> *Article 13(2) provides for the appointment of the Prime Minister at three different periods of time: (a) when Parliament is in session (the specific situation to which question (2) is addressed), (b) when Parliament is not in session, and (c) after Parliament has been dissolved.*
>
> In all three cases, there are some common features: the Queen's Representative makes the appointment; the person appointed must be a member of Parliament (or in case (c) a member of the Parliament which has been dissolved); and the criterion for appointment (with an exception in the proviso to paragraph (c) which is not relevant here) turns on the person appointed commanding the confidence of a majority of the members of Parliament (or in case (c) the members of the dissolved Parliament). The statement of that final criterion varies in significant ways between paragraph (a), on the one hand, and paragraphs (b) and (c), on the other, and these must be carefully noted. We return to that point after considering the precise words of paragraph (a).
>
> Under Article 13(2)(a), the Queen's Representative shall appoint as Prime Minister a member of Parliament
>
> > who commands the confidence of majority of the members of the Parliament.
>
> On their face these words appear to refer to a situation of fact and not to require any exercise of judgment or discretion by the Queen's Representative. Nor do they appear to leave any room for advice; in any event the general rule in Article 5 would not apply since there is no Prime Minister at the moment of a new appointment to that office. It is a person who actually commands that confidence who shall be appointed and not someone who the Queen's Representative judges or is advised is likely to. *That actual command would be evidenced by a vote of confidence in the candidate or some other unequivocal act of the legislature endorsing the candidate.*
>
> *This plain reading is enhanced by the formulations used for the making of appointments at the other two periods of time, that is when the Parliament is not in session or is dissolved. In the nature of things there can be no contemporaneous Parliamentary approval of the Prime Minister*

A *appointed at those times.* This fact is evidenced by three differences in the wording: at those times the Queen's Representative shall appoint a member who

(1) in the opinion of the Queen's representative,

B (2) acting in his discretion,

(3) is likely to

Command the confidence of majority of the members of Parliament. *These phrases and the timing clearly indicate that the*
C *Queen's Representative in these cases will have to make his own best estimate.* The party situation may make his task simple. If it does not, he will have to draw on his own good sense and political sensitivity and that of the other main actors (see *Adegbenro v. Akintola* [1963] AC 614, 628, discussed below). There can
D however be no guarantee that his judgment will turn out to be the correct one, and, even if correct to begin with, alignments may change before Parliament first meets. In either case, indeed in any case, should not Parliament be given the opportunity and have the responsibility to resolve any doubt? We can explain the wording of these paragraphs in no other way. The carefully-drawn
E differences between paragraphs (b) and (c) on the one side and paragraph (a) on the other must be seen as emphasising that when Parliament is in session it, in reality, and not the Queen's Representative, appoints the prime Minister if there is a vacancy. We shall, in considering the provisions about the duration and
F termination of appointment, see that they too provide further support for this Parliamentary role in respect of the tenure in office of the Prime Minister. (emphasis added)

[388] Thus, unlike art. XVI(6), art. 13(2) of the Constitution of Cook Islands is not a provision providing for the Prime Minister
G to tender his resignation when he ceases to command the confidence of the majority of the members of Parliament. It provides for the appointment of the Prime Minister in three different situations. It is true that the expression "command the confidence of a majority of the members of the Parliament" is used
H in art. 13(2) of the Constitution of Cook Islands. But that expression is used in three different situations provided by that Article, namely, (a) when Parliament is in session, (b) when Parliament is not in session, and (c) after Parliament has been dissolved. So, I do not see how that Article could be "highly
I persuasive" in the interpretation of art. XVI(6). I do not think

art. 13(2) of the Constitution of Cook Islands support the interpretation of art. XVI(6) which was made by the learned judge in the present appeal. Indeed, even in the *Cook Islands* case the Court of Appeal recognised the dangers in assuming that practices and precedents from other jurisdiction are applicable to the local situation:

> In a broader sense, the system of a Cabinet chosen from and responsible to, Parliament is based on the so-called Westminster model. But, as we shall see later, there are dangers in assuming that British or New Zealand or other precedents and conventions are automatically applicable. Indeed one recent writer has argued that a South Pacific model differing from the Westminster system and those exported to Asia and Africa, has developed (Greg, Fry, "Succession of Government in the Post-Colonial States of the South Pacific: new Support for Constitutionalism?" (1983) 18 Politics (Australian Political Studies Association) 48.

[389] Ending his conclusion on the first issue the learned judge in the court below quoted art. XVI(5) and then said:

> Therefore based on democratic practices any measure of loss of confidence in the MB Perak's leadership should be taken by a vote of no confidence against him on the floor of the State Legislative Assembly. Only in this manner can the Menteri Besar be forced to resign.

[390] Again, with respect I do not share his views. Democratic practices including those based on the British precedent, cannot be substitute for the written words of the Perak State Constitution. In this regards it is very useful to have in mind the wise words of caution by Viscount Radcliffe in *Adegbenro* in respect of the written Constitution of Western Nigeria which was quoted with approval by the Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187:

> But, accepting that, it must be remembered that, as Lord Bryce once said, the British Constitution "works by a "body of understandings which no writer can formulate"; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practise or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or

A the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.
B

[391] In *PP v. Kok Wah Kwan* [2007] 6 CLJ 341, Abdul Hamid Mohamad JCA (as his lordship then was) said:

[18] So, in determining the constitutionality or otherwise of a
C statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 (FC) "The ultimate touchstone of constitutionality is the Constitution itself and not any
D general principle outside it.

[392] In conclusion, I hold that there is no mandatory and/or express requirement in the Perak State Constitution that provides that there must be a vote of no confidence passed in the
E Legislative Assembly against Nizar before he ceased to command the confidence of the majority of the members of the Legislative Assembly. The fact that Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly under Article XVI(6) could be established by other means. Thus, His
F Royal Highness was right in making enquiries to satisfy himself as to whether Nizar had in fact ceased to command the confidence of the majority of the members of the Legislative Assembly, in considering Nizar's request for the dissolution of the Legislative Assembly.

G

Whether The Learned Judge Was Right In Holding That His Royal Highness Was Wrong In Appointing Zambry As The New Menteri Besar Of Perak

[393] This necessarily depends on the question whether the office
H of Menteri Besar was vacant when Zambry was appointed. The issue brings into focus again the interpretation of art. XVI(6). The question is, when the Menteri Besar ceases to command the confidence of the majority of members of the Legislative Assembly but on his request His Royal Highness withholds the consent to
I dissolve the Legislative Assembly, can the Menteri Besar continue to remain in office? Must he be formally dismissed? Can His Royal Highness dismiss him?.

[394] As a starting point it is important to have in mind the two observation made by the learned judge in the court below at the outset of his discussion of the issue before him. The first is as follows:

> It is not in dispute that His Royal Highness had exercised the royal prerogative in this case pursuant to Article XVI(2)(a) and (6) of the Perak's State Constitution. However the applicant is not asking the Court to review His Royal Highness prerogative to appoint the respondent as MB Perak or His Royal Highness prerogative to withhold consent to dissolve the State Legislative Assembly. The applicant concedes that the two royal prerogatives are not subject to review and non justiciable. That is the reason, the applicant said, His Royal Highness was not made a party to the present disputes.

[395] The second observation made by the learned judge is as follows:

> I never had any doubt that the exercise of royal prerogative to appoint a Menteri Besar pursuant to Article XVI(2) Perak's State Constitution is solely based on personal judgment of His Royal Highness and that His Royal Highness may resort to any means in order to satisfy himself and accordingly to form his judgment as to whom who is likely to command the confidence of the majority of the State Legislative Assembly that he can be appointed as the Menteri Besar to lead the Executive Council.
>
> I also have no doubt that His Royal Highness has absolute discretion with regard to the appointment of a Menteri Besar and the withholding of consent to a request for the dissolution of the State Legislative Assembly. This in plain and obvious from the reading of Article XVIII(1) and (2)(a) and (b) of Perak's State Constitution.

[396] Then the learned judge set out the reasons which eventually led him to conclude that art. XVI(6) could not be read to mean that the office of the Menteri Besar became or deemed to be vacant if he refused to resign "under the circumstance of art. XVI(6)".

[397] For a start, the learned judge opined that once a Menteri Besar was appointed, he did not hold office at the pleasure of His Royal Highness and that collectively with his Executive Council, he was responsible to the Legislative Assembly. Further, according to the learned judge:

A Reading Clauses (2), (5), (6) and (7) of Article XVI of Perak State Constitution it is obvious that once a Menteri Besar is appointed he is answerable to the State Legislative Assembly and to no one else, what that means is that once appointed, the Menteri Besar governs the State through the Executive Council and advises His Royal Highness on the affairs of the State as provided under Article XVIII(1) of Perak's State Constitution, whose advice His Royal Highness shall act upon except in matters where the Constitution provides that His Royal Highness may act in his own absolute discretion. However, because the Menteri Besar holds office not at the pleasure of His Royal Highness, the Menteri Besar cannot be dismissed from his office by His Royal Highness.

[398] Next, the learned judge referred to the submission made by the Attorney General which was adopted by the learned counsel for Zambry. The submission was as follows:

On this point the Attorney General submitted that the contention by the applicant that by virtue of Article XVI(7) the Menteri Besar cannot be dismissed from office must be seen in the context of Article XVI(6). Specifically the Attorney General submitted that Article XVI(7) must be read subject to Article XVI(6) Perak's State Constitution. He further submitted that Article XVI(6) uses the word 'shall tender his resignation', so he said what will happen if the Menteri Besar does not resign under the circumstance of Article XVI(6) Perak's State Constitution? He went on to suggest that not resigning when one is without a majority is against democratic principles. He submitted that it is an established convention to resign in such circumstances. The Attorney General further submitted that the Constitution is a living piece of legislation and that the Government has to function.

[399] The learned judge did not agree with the submission of the Attorney General. He said:

I do not agree with the submissions. I do not find anything in Clause (7) of Article XVI that warrants it to be read subject to Clause (6) of the same Article in the manner suggested by the Attorney General as to the dismissal of the Menteri Besar. There is no ambiguity in the language in Clause 7. That Clause simply provides except for the Menteri Besar that other members of the Executive Council hold office at the pleasure of His Royal Highness. This means that they (the members of the Executive Council except the Menteri Besar) may be removed from office

by His Royal Highness acting on advice of the Menteri Besar. As for the Office of Menteri besar, Clause 7 of Article XVI Perak's State Constitution says that the Menteri Besar does not hold office at the pleasure of His Royal Highness. However the qualifier at the beginning of Clause 7 suggests that the Menteri Besar shall tender his resignation pursuant to Clause 6 of Article XVI if he ceases to command the confidence of majority in the State Legislative Assembly.

[400] In coming to the above conclusion, the learned judge declined to follow *Amir Kahar*. Instead, he relied on *Ningkan*.

[401] The learned judge then said that the provisions of the constitution must not to be construed in a narrow or pedantic sense but liberally. However, according to him, in doing so, the court was not at liberty to stretch or pervert the language of the constitution for the purpose of supplying omission or of correcting supposed errors. Applying this principle the learned judge held that a deeming provision cannot be read into art. XVI(6). He said:

In the absence of such express provision I do not think that a deeming provision should be read into Article XVI(6). To do so would be do violence to the language of the Article XVI(6) Perak's State Constitution which in my opinion contains no ambiguity whatsoever. But in my view no matter how mandatory is the word 'shall' in Article XVI(6), it cannot be read to mean that the office of Menteri Besar becomes or deemed to be vacant if the Menteri refuses to resign under the circumstance of Article XVI(6) Perak's State Constitution. It cannot be done because the language of Article XVI(6) is so plain and obvious. What is so plain and obvious in Article XVI(6) is that the Menteri Besar shall tender his resignation if he faces the circumstances specified in the said Article which is that he has ceased to command the confidence of the majority in the State Legislative Assembly.

[402] With respect again I do not agree with the interpretion and conclusion made by the learned judge. As I have said earlier, in considering art. XVI(6), regard must be had to art. XVI(1) and (2), which provides:

(1) His Royal Highness shall appoint an Executive Council.

(2) The Executive Council shall be appointed as follows, that is to say:

A (a) His Royal Highness shall first appoint as Menteri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly; and

B (b) he shall on the advice of the Menteri Besar appoint not more than ten nor less than four other members from among the members of the Legislative Assembly.

The effect of the above provision is that the Menteri Besar must C be a member of the Legislative Assembly who, in His Highness judgment, is likely to command the confidence of the majority members of the Legislative Assembly. Pursuant to art. XVIII(2)(a), the appointment of the Menteri Besar under art. XVI(2)(a) is within the absolute discretion of His Royal Highness, the exercise D of which is non justiciable. Since "commanding the confidence of the majority of the members of the Legislative Assembly" is a precondition for the appointment of the Menteri Besar, can the Menteri Besar who ceases to command the confidence of the majority of members of the Legislative continue to be Menteri E Besar? Based on the principle which has been accepted in the United Kingdom, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House (see *Adegbenro*, per Viscount Radcliffe at p. 628). But in Malaysia and in particular F in Perak there is a written constitution. This where art. XVI(6) comes into play. It provides:

> If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative G Assembly, he shall tender the resignation of the Executive Council.

[403] The provision is clear. If the Menteri Besar ceases to command the confidence of the majority of the members of the H Legislative Assembly, he cannot remain in office. He must either request for a dissolution of the Legislative Assembly or tender the resignation of the Executive Council (which includes himself). If the Menteri Besar tenders the resignation of the Executive Council, it shall be dissolved and pursuant to art. XVIII(2)(a) & I (b), His Royal Highness must appoint a member of the Legislative Assembly, who, in His Highness judgment is likely to command the

confidence of the majority of the members of the Legislative Assembly to be Menteri Besar to preside over the new Executive Council. His Royal Highness must also appoint not more than ten or not less than four other members of the Executive Council from amongst members of the Legislative Assembly. If the Menteri Besar requests for the dissolution of the Legislative Assembly and His Royal Highness consents to the request, the Legislative Assembly will be dissolved, and pursuant to art. XXXVI(4) there will be fresh election. If however, His Royal Highness, in exercise of his discretion under art. XVIII(2)(b), withholds the consent to a request for the dissolution of the Legislative Assembly, the Menteri Besar has no choice. He must tender the resignation of the Executive Council. His Royal Highness shall then carry out his constitutional duty of appointing a new Menteri Besar and other members of the Executive Council under art. XVI(2). In this connection, commenting on the principle accepted in the United Kingdom that a Prime Minister ought not to remain in office once it has been established that he has ceased to command the support of a majority of the House, Viscount Radcliffe said in *Adegbenro*:

> But, when that is said the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the **good sense and political sensitivity of the main actors called upon to take part.** (emphasis added)

[404] In the context of the present appeal, Nizar remained adamant in his stand that he was still the Menteri Besar contending that he had never resigned, and that he had no reason to resign because there was no vote of confidence passed against him in the Legislative Assembly. On Nizar's request to dissolve the Legislative Assembly under art. XVI(6), His Royal Highness had made enquiries, at the end of which His Royal Highness was satisfied that Nizar had ceased to command the confidence of the majority of the members of the Legislative Assembly. Pursuant to art. XVIII(2)(b), His Royal Highness did not consent to the request by Nizar to dissolve the Legislative Assembly. In a press statement issued on 5 February 2009 through His Royal Highness' Private Secretary, Nizar was informed of the decision of His Royal Highness and that pursuant to art. XVI(6), Nizar and the members of the Executive Council were to resign and that if Nizar

A and members of the Executive Council did not resign, the post of the Menteri Besar and the Executive Council would be deemed to be vacant. On 6 February 2009, in accordance with art. XVI(2)(a), and being satisfied that Zambry had commanded the confidence of the majority of the members of the Legislative
B Assembly, His Royal Highness appointed Zambry as the Menteri Besar of Perak. So, clearly the learned judge erred when he concluded in his judgment that:

> just because His Royal Highness had formed a judgment that the
C respondent is likely to command the confidence of the majority for the purpose of Article XVI (2)(a) to appoint the respondent as Menteri Besar it does not mean that His Royal Highness opinion or judgment is applicable in deciding that the applicant ceases to command the confidence of the majority of the members of the Legislative Assembly.

D

The material events did not happen the way the learned judge perceived them which led him to make the aforesaid erroneous conclusion. To recount the facts, on 5 February 2009 the circumstances clearly showed that Nizar no longer commanded the
E confidence of the majority of the members of the Legislative Assembly. There were signed letters from 31 members of the Legislative Assembly pledging support to the Barisan Nasional which were presented to His Royal Highness. They presented themselves before His Royal Highness, whereby His Royal
F Highness had interviewed all of them. It is an undisputed fact that His Royal Highness interviewed the 3 independent members of the Legislative Assembly separately in order to ascertain that they had really supported the Barisan Nasional. They informed His Royal Highness that they no longer support Nizar as the Menteri Besar.
G Instead, they declared their support to Barisan Nasional. At the end of it, His Royal Highness was satisfied that with the 31 members of the Legislative Assembly supporting the Barisan Nasional, Nizar had ceased to command the confidence of the majority of the members of the Legislative Assembly. I have no
H doubt that on the evidence available, the conclusion made by His Royal Highness was right as it was the only conclusion which could be made. Then, His Royal Highness issued the press statement through his Private Secretary. Nizar did not resign. Instead, once again he requested for the dissolution of the
I Legislative Assembly. It was only on 6 February 2009 that His Royal Highness appointed Zambry as the Menteri Besar.

[405] I revert to the learned judge's judgment. He held that the press statement issued by His Royal Highness through his Private Secretary amounted to dismissal of Nizar which according to the learned judge was not permissible under art. XVI(6). As would be recalled, the learned judge said that the obvious effect of arts. XVI(2), (5), (6) and (7) was that once appointed, the Menteri Besar was answerable only to the Legislative and to no one else. Further, the learned judge said that because the Menteri Besar did not hold his office at the pleasure of His Royal Highness, the Menteri Besar could not be dismissed from his office by His Royal Highness. In the end, the learned judge posed the question: what if the Menteri Besar refuses to tender his resignation and he cannot be removed from office? The learned judge then said obviously there was a *lacuna* in the said article but that *lacuna* could not be filled up by reading into it a deeming provision and that the *lacuna* must be filled up by amendment to the said article. I cannot uphold the views of the learned judge. Article XVI(6) is clear. As I have demonstrated earlier, it is intended to apply to a situation when the Menteri Besar ceases to command the confidence of the majority of the members of Legislative Assembly, in which case, unless, at his request His Royal Highness dissolves the Legislative Assembly, he ought not to remain in office, so that the Executive Council can be dissolved, and a new Executive Council can be appointed by His Royal Highness under art. XVI(2) to advise him. This is to ensure the smooth running of the Government. In *Amir Kahar*, the court said:

> Thus, once a Chief Minister in fact knows that he has lost the confidence of a majority of the members of the assembly, he should not wait for a vote of confidence to be normally tabled in the Assembly but should immediately take the honourable way out by tendering the resignation of his Cabinet. *Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of a majority of the members of the Assembly and it is not necessary, therefore, for the Yang di-Pertua Negeri as a last resort to remove the Chief Minister and the other members of his Cabinet.* This is not only the effect of Article 7 of the Constitution but it is the established convention. See page 73 of *Adegbendro v. Akintola* [1963] 3 WLR 63 in regard to the established convention. The fact of a Chief Minister ceasing to command the confidence of a majority of the members of the

A Assembly can be evidenced by various situations and circumstances. It can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are not by any means exhaustive. There is no where in the
B Constitution to say that the only evidence of such fact must be through the actual vote in the Assembly. (emphasis added)

[406] I agree. Articles XVI and XVIII contain the provisions essential for the establishment and the continous government of the State Perak. These provisions contain the constitutional
C powers, duties and responsibilities of Ruler, the Menteri Besar and the Executive Council of the State of Perak. In my view, since Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly, and at his request His Royal Highness withheld the consent to dissolves the Legislative
D Assembly, Nizar must tender the resignation of the Executive Council. His refusal to tender his resignation and the resignation of the Executive Council was not merely a breach of convention and undemocratic, but more importantly, it contravened the clear mandatory constitutional command under art. XVI(6) and
E therefore unconstitutional. Thus, since he had ceased to command the confidence of the majority of the members of the Legislative Assembly, it is implicit that on his refusal to tender the resignation as aforesaid, the Executive Council was thereby dissolved and the office of the Menteri Besar vacated.

F

[407] The next question is can His Royal Highness dismiss the Menteri Besar? It was contended by Tuan Haji Sulaiman Abdullah that the Perak State Constitution did not confer the powers on His Royal Highness to dismiss the Menteri Besar. In his written
G submission, Dato' Cecil Abraham submitted that by way of analogy, His Royal Highness did have the power to remove Nizar as the Menteri Besar. He argued that this power was derived from the provisions under s. 47 of the Interpretation Acts 1948 and 1967 (Act 388). Reference must now be made again to
H art. XVI(2) and art. XVI(6) which are in *pari material* respectively with arts. 6(3) and art. 7(1) under the Sarawak State Constitution. This takes me back to *Ningkan*. In *"Dismissal of Chief Ministers"* by S.M Thio *(supra)*, in commenting on the decision in Ningkan, the learned writer expressed the following views which I find
I illuminating:

> Article 6(3) imposes the condition for the appointment of the Chief Minister but there is no express provision for the dismissal of the Chief Minister. Article 7(1) requires the Chief Minister to either request for a dissolution of the Council or tender the resignation of the Supreme Council should he cease to command the confidence of a majority of the members of the Council. Again, there is no express provision for his dismissal should he fail to act in accordance with Article 7(1). However, it is submitted that it is implicit in the constitutional scheme that the Governor has a power of dismissal in these circumstances. Otherwise, a recalcitrant Chief Minister may act unconstitutionally with impunity. It should be noted that under section 21 of the Interpretation Ordinance it is provided that where there is a power to appoint, there is a power to dismiss, and that where the power of appointment is subject to the approval of some other person, the power of dismissal may only be exercised subject to the approval of such other person.

In the context of the constitutional position under the Perak State Constitution, reference must be made to s. 94, Part II of Act 388. The said Part II (ie, Interpretation and General Clauses Ordinance 1948) is applicable to the Interpretation of Part I of the Perak State Constitution virtue of art. IV(3) which reads:

> Without prejudice to the provisions of Article 63, except where the interpretation of any word or expression is expressly provided by this Part or where the context otherwise requires, the Interpretation and General Clauses Ordinance, 1948, or any Ordinance substituted therefor shall apply for the interpretation of this Part as it applies for the interpretation of any written law.

Section 94 of Act 388 provides:

> 94. Where a written law confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:
>
> Provided that where the power of such person or authority to make such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of dismissal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

[408] Under art. XVI(2)(a), the power to appoint the Menteri Besar is conferred upon His Royal Highness. Under art. XVIII(2)(a), this power is exercisable by His Royal Highness in his absolute discretion. In other words, it is His Royal Highness' prerogative. In making the appointment of the Menteri Besar, His Royal Highness is not subject to recommendation or the approval or consent of any other person or authority. The only qualification under art. XVI(2)(a) is that His Royal Highness shall appoint as Menteri Besar a member of the Legislative Assembly, who, in his judgment is likely to command the confidence of the majority of the members of the Legislative Assembly. It is true that once appointed, pursuant to art. XVI(7), unlike the members of the Executive Council, the Menteri Besar does not hold office at His Royal Highness' pleasure. However, that tenure of the Menteri Besar's office as provided by the opening words of art. XVI(7), is subject to art. XVI(6), and this is where the art. XVI(6) comes into play again. This simply means that although the Menteri Besar does not hold office at His Royal Highness' pleasure, if he ceases to command the confidence of the majority of the members of the Legislative Assembly, he and his Executive Council must resign, unless at his request, His Royal Highness dissolves the Legislative Assembly. In this regard, I have explained at length elsewhere in this judgment, that a vote of no confidence passed in the Legislative Assembly is not the only mode of establishing the fact that the Menteri Besar has ceased to command the confidence of the majority of the members of the Legislative Assembly. What happens if the Menteri Besar refuses to resign? The obvious answer is that since His Royal Highness is conferred with the power to appoint the Menteri Besar under art. XVI(2)(a), and since the only qualification to the exercise of that power is His Royal Highness' own judgment that the member of the Legislative Assembly to be appointed as Menteri Besar must be a member who is likely to command the confidence of the majority of the members of the Legislative Assembly, pursuant to s. 94 of Act 388, that power of His Royal Highness must include the power to dismiss the Menteri Besar. Thus, the power of His Royal Highness to dismiss the Menteri Besar is implicit in the event that the latter refuses to resign although he has ceased to command the confidence of the majority of the members of the Legislative Assembly and His Royal Highness has, on his request, withheld His Royal Highness' consent to dissolve the Legislative Assembly.

[409] The construction that I have adopted resulting from the interplay of the relevant articles, and of the combined effect of the relevant articles and s. 94 of Act 388 as aforesaid, will, to my mind, ensure the smooth and harmonious working of the relevant articles enacted for the establishment of the Government of the State of Perak and the uninterrupted and smooth running of the said Government, and overcome the absurdity or practical inconvenience which any other construction would create. For example, the construction adopted by the learned judge in the court below, would result in an uncooperative Menteri Besar who lacks "good sense and political sensitivity" (to use the words of Viscount Radcliffe in *Adegbenro*), refusing to resign despite having ceased to command the confidence of the majority. That surely would not be the consequence intended by the legislature under art. XVI(6).

[410] In support of his conclusion, the learned judge in the court below also relied on the legislative history art. 43(4) of the Federal Constitution which is in *pari material* with art. XVI(6), except that in the latter, instead of "Prime Minister", "Menteri Besar" was used. The learned judge observed that art. 43(4) of the Federal Constitution had its origin in art. 36(2) in the draft Federation of Malaya Constitution proposed by the Reid Commission which read:

> The Yang di-Pertuan Besar shall appoint from among the members of the House of Representatives a Prime Minister who is in his judgment most likely to command the confidence of the majority of the members of that House and, if the Prime Minister ceases to command such confidence, the Yang di-Pertuan Besar shall either, at the request of the Prime Minister, dissolve Parliament or remove the Prime Minister from office.

[411] From the legislative history of art. 43(4) of the Federal Constitution, which he said was applicable in interpreting art. XVI(6), the learned judge concluded that the dismissal of the Menteri Besar by His Royal Highness or by anyone else was never contemplated under that article. Commenting on this, in his submission before us, the Attorney General contended that the learned judge failed to consider para 69 of the recommendation of the Reid Commission which read as follows:

> 69. We recommend (art. 47) that the duration of each Parliament should be five years subject to powers of dissolution at any time within the life of Parliament, and that the Constitutional responsibility for dissolving Parliament should rest with the Yang di-Pertuan Besar (Art. 35(b)). Experience has shown that there are substantial objections to the Prime Minister or the Government of the day having unrestricted power to insist on a dissolution of Parliament. A Prime Minister may ask for a dissolution in various circumstances and it is not possible to define the circumstances in which his request ought to be granted. Normally the yang di-Pertuan Besar would accept the advice of his Prime Minister but he should not be bound to do so in all cases. He ought in a critical case to be free to decide what is in the best interest of the country. We recommend (Art. 36) that if the prime Minister ceases to command the confidence of the House of Representatives he must either vacate his office or ask for a dissolution. If the Prime Minister asks for a dissolution and the yang di-Pertuan Besar refuses this request, then the Prime Minister must vacate his office.

The Attorney General then submitted that:

> The present Article 43(4) of the Federal Constitution (*pari material* with Art. XVI(6) of the Perak Constitution) was drafted in line with the Reid Commission recommendation. There is no issue of dismissal of the Prime Minister or the MB. If the Prime Minister ceases to command the confidence of the House of Representatives he must either vacate his office or ask for a dissolution. If the Prime Minister asks for a dissolution and the Yang di-Pertuan Agong refuses this request, then the Prime Minister must vacate his office.

I think there is force in the Attorney General's submission.

[412] In his submission urging us to follow *Ningkan* and in support of his submission that under art. XVI(6) His Royal Highness had no power to dismiss the Menteri Besar, in addition to the Reid Commission Report (which the learned judge had referred to in his judgment), Tuan Haji Sulaiman also relied on the aftermath of the High Court decision in *Ningkan* and the action taken by the Federal Government pursuant thereto. He referred to the Emergency proclaimed by the Federal Government and submitted that it was telling that after the decision in *Ningkan*, emergency provisions were enacted to give express power to dismiss the Chief Minister. He referred to the following passage in

the speech of Lord MacDermott in delivering the judgment of the Privy Council in *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 2 MLJ 238 *("Ningkan 2")*, at 240-241:

> There can be no doubt that this Proclamation was directed to the constitutional impasse which had come about in Sarawak as already described, and that its immediate purpose was to enable the Federal Parliament to exercise the further legislative powers provided for by article 150(5) of the Constitution. This the Federal Parliament purported to do on the 19th September, 1966, when it passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. This is the statute which is now challenged by the appellant and it will be referred to hereafter as the "impugned Act". It commenced by reciting the Proclamation of Emergency and that "... it appears to Parliament that the following provisions of this Act are required by reason of the said Emergency." Of these provisions section 3 amended clause (5) of article 150 of the Federal Constitution by adding to the words "notwithstanding anything in this Constitution" the words "or in the Constitution of the State of Sarawak", and then made a similar amendment in clause (6) of the same article; section 4 drastically enlarged the powers of the Governor of Sarawak in regard to summoning meetings of the Council Negri and the transaction of business thereat; and section 5 enacted specifically that the Governor might, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council if (a) at any meeting of the Council Negri a resolution of no confidence in the Government was passed by a majority of members present and voting, and (b) the Chief Minister after the passing of such a resolution failed to resign and to tender the resignation of the members of the Supreme Council. The main aim of these provisions was to make good the lack of powers on the part of the Governor on which Harley J. Had based his judgment. They were temporary provisions in the sense that, under article 150(7) of the constitution, they were to cease to have effect six months after the termination of the Emergency. But it was not disputed that they involved a modification, albeit temporary, of the 1963 Constitution of Sarawak and would have been beyond the powers of the Federal Parliament before the declaration of Emergency.
>
> On the 23rd September, 1966, the Council Negri met and passed a vote of no confidence in the appellant and on the next day the Governor of Sarawak, purporting to act under the provisions of the impugned Act, dismissed the appellant from his position of chief Minister and appointed the said Penghulu Tawi Sli to be Chief Minister in his stead.

[413] Tuan Haji Sulaiman then referred to the part in the judgment where Lord MacDermott referred to the explanatory statement in the Bill which later became the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 (referred to in that judgment as the "impugned Act"):

> In the explanatory statement issued by the Government of Malaysia while the impugned Act was a Bill in Parliament the following passages appear in reference to the events in Sarawak that have been mentioned already:
>
> 1. A constitutional crisis has occurred in Sarawak which the Yang di-Pertuan Agong is satisfied constitute a grave emergency whereby the security of Sarawak is threatened.
>
> 2. There is already in force a Proclamation of Emergency issued on 3rd September, 1964, in respect of the whole Federation, the occasion for which is a matter of public knowledge.
>
> 3. The Yang di-Pertuan Agong, in exercise of his powers under article 150 of the Constitution, has on the 14th September, 1966, issued a further Proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed. In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resigation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious *lacuna* in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the Proclamation of Emergency, a threat to the security of Sarawak.

[414] The important thing to observe is that there is nothing in the two passages and indeed the whole judgment which shows that the Privy Council approved the judgment of the High Court in *Ningkan* on the proposition of law that it made. In fact in *Ningkan 2,* the Privy Council was not requested nor required to decide on the High Court judgment in *Ningkan*. The Privy Council did not sit to consider the appeal from the decision in *Ningkan.* The issue before the Privy Council in *Ningkan 2* was whether the impugned Act was *ultra vires* and invalid. The explanatory statement in the Bill of the impugned Act quoted by Lord MacDermott, merely summed up the High Court judgment in *Ningkan* and the serious consequences flowing from it. There is nothing in the explanatory statement to say that the Federal Government accepted the High Court decision in *Ningkan*. The fact that there was no appeal against the High Court decision in *Ningkan*, the declaration of the emergency and the introduction of the impugned Act do not conclusively mean that the High Court decision was correct. It is true that the Federal Government acted on it. But that does not necessarily mean that it accepted the judgment as correct. Looking back into history it is impossible to say with certainty what prompted the Federal Government to act the way it did or whether what it did was right or justified, or whether it should have appealed against the judgment in *Ningkan.* Considering the passage in the judgment of Lord MacDermott which I now quote, perhaps it should. In *Ningkan 2* his Lordship said at p. 242:

> It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, *or to enquire whether that situation could itself have been avoided by a different approach. But, taking the position as it was after Harley J had delivered judgment in September, 1966,* they can find, in the material presented, no ground for holding that the respondent Government was acting erroneously or in any way *mala fide* in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of stable government, and amounted to an emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience. And although the Indonesian Confrontation had then ceased, it was

> open to the Federal Government, and indeed its duty, to consider the possible consequences of a period of unstable government in a State that, not so long before, had been facing the tensions of Confrontation and the subversive activities associated with it. That the appellant regarded the Federal Government's actions as aimed at himself is obvious and perhaps natural; but he has failed to satisfied the Board that the steps taken by the Government, including the Proclamation and the impugned Act were in *fraudem* legis or otherwise unauthorised by the relevant legislation.
>
> Their Lordships would add that, in their opinion, the continuing existence of earlier Emergency Proclamations or Acts (whether under article 149 or article 150 of the Federal Constitution) could not, in the circumstances, justify a different conclusion. The emergency, the subject of this appeal, was distinct in fact and kind from those that had preceded it, and the powers conferred by article 150 were in being and not spent when it arose. (emphasis added)

[415] Again there is nothing in that passage to say that the High Court in *Ningkan* was right on the proposition of law that it had made but for the purpose of the judgment in *Ningkan 2*, the Privy Council took "the position as it was after Harley J had delivered judgment in September 1966." That passage however provides insight into what were the state of affairs and the circumstances prompting the Federal Government to do what it did. It was no ordinary situation. It had to consider the Indonesian Confrontation which had then just ended and the tensions and possible subversive activities associated with it which could constitute a threat to the security of the state. It was a situation whereby, a constitutional crisis had occurred following the High Court decision in *Ningkan*, constituting grave emergency threatening the security of the State of Sarawak. Therefore, the circumstances prevailing then demanded that the Federal Government move fast and decisively, in the context of which, moving for judicial remedy of appeal against the decision in *Ningkan* might not provide speedy enough solution to deal with the constitutional impasse. In my view, it is in that light that the Federal Government's action's after the judgment in *Ningkan* (including the introduction of the impugned Act and the decision in not appealing against that judgment in *Ningkan*) must be judged. In any case the High Court judgment in *Ningkan* remained untested until 1994 when the learned judge in *Amir Kahar* declined to follow it. Furthermore, I do not think the legislative history of art. 43(4) of the Federal

Constitution and what occurred after *Ningkan*, though useful, is conclusive in assisting this court in determining the issue before it. The principle on the use legislative history as an aid to interpretation was clearly stated by Lord Diplock in *Fothergill v. Monarch Airlines Ltd* [1981] AC 251, at 279-280:

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining "the intention of Parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. *The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.*

[416] So in the end we have to fall back on the wording of the Perak State Constitution. As I have demonstrated, therein lies the answer. I have explained at some length my construction of arts. XVI(2), XVI(5), XVI(6), XVI(7) and XVIII(2)(a) and (b). I have also explained how, relying on the language used in those provisions, I arrived at my conclusions on the issue under consideration. To recapitulate, since Nizar ceased to command the confidence of the majority of the members of the Legislative Assembly, and at his request, His Royal Highness withheld His Royal Highness' consent to dissolve the Legislative Assembly, Nizar must tender the resignation of the Executive Council. His

refusal to tender his resignation and the resignation of Executive Council was not merely a breach of convention and undemocratic, but more importantly, it contravened the clear mandatory constitutional command under art. XVI(6) and therefore unconstitutional. Thus, since he had ceased to command the confidence of the majority of the members of the Legislative Assembly, it is implicit that on his refusal to tender the resignation as aforesaid, the Executive Council is thereby dissolved and the office of the Menteri Besar vacated. Furthermore, I am also of the view that the power of His Royal Highness to dismiss the Menteri Besar is implicit in the event that the Menteri Besar refuses to resign although he has ceased to command the confidence of the majority of the members of the Legislative Assembly and His Royal Highness has, on his request, withheld His Royal Highness' consent to dissolve the Legislative Assembly. So, even if the press statement issued by His Royal Highness through his private secretary on 5 February 2009 amounted to the dismissal of Nizar, that dismissal was still valid. Thus, His Royal Highness was right in appointing Zambry as the Menteri Besar of Perak under art. XVI(2)(a).

Conclusion

[417] At the start of his submission replying to the submission of the learned counsel for Zambry and the submission of the Attorney General for the intervener, Tuan Haji Sulaiman submitted that the truly absurd position would be: the Prime Minister can be woken up in the morning, the Yang di-Pertuan Agong calls him and says "members of Parliament came to see me saying they had no confidence in you. So, please resign". That, according to the learned counsel would, in effect be the position if Zambry's counsel's and the Attorney General's submission was correct. In response I can do no better than refer to the observation of Viscount Radcliffe in *Adegbenro* with regard to the powers of the Governor of Nigeria, which, in my view, is applicable in the context of the exercise of the powers of His Royal Highness under the Perak Constitution which are the subject of this appeal:

> But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and propriety which it is

for him to weigh on each particular occasion: they are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. *To sum up, there are many good arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded vote.* (emphasis added).

[418] In my judgment, the situation confronting His Royal Highness in the State of Perak was one such situation, and His Royal Highness had, in that critical situation rightly exercised his constitutional powers provided under the Perak State Constitution, which exercise was, without any doubt, solely for the best interest of the people and the State of Perak.